No. 7937

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RICHARD C. HYLAND, doing business under the fictitious name and style of Hyland Bag Company,

Appellant,

vs.

MILLERS NATIONAL INSURANCE COMPANY (a corporation), DUBUQUE FIRE & MARINE INSURANCE COMPANY (a corporation), NATIONAL RESERVE INSURANCE COMPANY (a corporation), MINNESOTA FIRE INSURANCE COMPANY (a corporation), FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY (a corporation), THE MERCHANTS FIRE INSURANCE COMPANY (a corporation), WESTERN INSURANCE COMPANY OF AMERICA (a corporation), and NATIONAL LIBERTY INSURANCE COMPANY (a corporation),

Appellees.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF FOR APPELLANT.

INTRODUCTION.

The appellant was the plaintiff in the trial court, and the appellees were defendants. Hence the parties before this court are in the same relative positions as they were in the court below.

This case is extraordinary in the size of the record. There are 3448 printed pages, more than 200 exhibits, and 134 assignments of error.

This case is also extraordinary in that a court of equity which abhors forfeitures has inflicted a large forfeiture and penalty upon appellant. By the imposition of the forfeiture herein, appellant is by a decree in equity deprived not only of his purse, but also of his good name.

The case is likewise extraordinary in the lengthy memorandum opinion of the trial court, which it adopted as its findings of fact and conclusions of law. The opinion seemingly partakes of the bitterness of appellees toward appellant. It is argumentative. It goes beyond the bounds of the judicial necessities of the case, and no opportunity is omitted to reflect unfavorably upon appellant.

The size of the record and the argumentative nature of the opinion of the trial court has rendered the task of writing the brief of appellant of more than usual difficulty. These same facts likewise add tremendously to the burden of this court in considering the appeal.

The attorney for appellant has endeavored to comply with the suggestion of the court, made on motion for extension of time, to the effect that the brief should be condensed as much as possible. A sincere effort has been made in that behalf.

STATEMENT OF THE CASE.

Appellant sustained a fire loss which was insured against by appellees. The amount of appellant's loss was disputed. Appellant at first claimed a loss of $73,601.96, and later increased his claim to $106,-992.83. The appellees at first admitted the loss was $22,733.18, and later by their answers in this case admitted, in effect, that the loss was $35,000.00.

Because several insurance companies were involved, and some denied liability, the loss had to be apportioned, and appellant brought this action in equity to ascertain and apportion the liability of the several appellee companies upon the fire loss sustained. However, what the total amount of the loss was, or how it should have been apportioned, was not determined, for the trial court decreed that appellant had forfeited his entire claim and denied him any relief whatsoever.

The fire in question occurred in appellant's factory at 243 Sacramento Street, San Francisco, on October 19, 1929. It caused loss and damage to appellant's stock of merchandise, which consisted of manufactured bags and cotton liners, bags in process of manufacture, and materials to be used in manufacture.

The policies in suit all cover damage to stock, and are in the total sum of $185,000.00. Five policies which total $50,000.00 are combination of specific and excess insurance. One policy by Western Insurance Company is for $50,000.00 and is to attach when values are in excess of $50,000.00; the last group consists of two cover notes written by appellee Na-

tional Liberty Insurance Company for $85,000.00, which call for policies according to the standard California statutory form, but which said appellee, by a cross-complaint asks to have reformed into excess policies to attach when values exceed $100,000.00.

All appellees plead certain special defenses which may be grouped under two heads: first, that appellant swore falsely in his proof of loss that the fire which caused the damage "originated from causes unknown to this assured" when he "at all said times knew that said fire was of incendiary origin"; and second, that appellant in his sworn proof of loss claimed his loss was $73,601.96, whereas the loss sustained by appellant "did not exceed the sum of $35,000.00, which fact the plaintiff (appellant) well knew at the time of preparing and verifying said purported proof of loss."

The appellee companies writing the first $50,000.00 of insurance plead the additional defense that an appraisement of the loss was not had under the terms of the policy due to the acts of the plaintiff, and the appraiser appointed by him. The Western Insurance Company of America plead an additional defense that its policy was for damage in excess of $50,000.00, and that the loss was less than that amount. The National Liberty Insurance Company plead also that it was only liable if values were in excess of $100,000.00.

Without making definite findings of fact upon the issues made by the pleadings, the honorable trial court wrote a memorandum opinion which it adopted

as its findings of fact and conclusions of law, and ordered judgment for appellees.

The appellant filed a petition for rehearing which was denied. Thereafter he appealed and now presents his appeal for consideration by this Court.

QUESTIONS ON APPEAL.

The questions involved on this appeal are:

(a) Can it equitably be held in this case that appellant has forfeited his right to recover from appellees the loss sustained by him, to-wit, the sum of $35,000.00 as admitted by appellees, or a larger sum as claimed by appellant?

(b) Is the memorandum opinion of the trial court adopted as its findings of fact and conclusions of law a compliance with Equity Rule 70½ requiring the facts to be found specially?

(c) Is appellant's right to recover his loss from certain appellees defeated by the failure of an appraisement prior to the commencement of this action?

(d) If appellant is entitled to recover, what is the amount he should recover and how should it be apportioned among appellees?

The determination of these questions depends upon whether or not the trial court committed error in reference to matters specified in the assignments of error in this case.

THE ERRORS RELIED UPON.

Appellant makes the following statement of the substance of the errors relied upon:

First. The trial court erred in denying plaintiff's motion for special findings.

(Assignment of Error CXXV, V. VI, p. 3421; V. I, p. 203; V. VI, p. 3380.)

Second. The trial court erred in finding that plaintiff was guilty of fraud and false swearing in his proofs of loss and that there was overvaluation which resulted from an intentionally fraudulent attempt to get an excessive award from defendant insurance companies; furthermore any defense of false swearing was waived.

(Assignment of Error XC, V. VI, p. 3412, and Assignment of Error LXXXIX, p. 3412.)

Third. The court erred in holding that the heart of plaintiff's contention is that large quantities of goods were burned out of sight and that unless large quantities were burned out of sight plaintiff's claims are so excessive as to be false and fraudulent.

(Assignment of Error XCII, V. VI, p. 3413.)

Fourth. The court erred in finding that plaintiff knew what was in his factory and that his claim of loss was overvalued and that he tried to escape responsibility that the proofs were prepared by his employees and their knowledge would be imputed to him.

(Assignment of Error XCI, V. VI, p. 3412.)

Fifth. The court erred in considering the suspicious circumstances surrounding the fire in connection with the alleged fraud and false swearing.

(Assignments of Error LXXXVI, LXXXVII, LXXXVIII, V. VI, p. 3411.)

Sixth. The court erred in considering that the amount of insurance carried on the stock was a suspicious circumstance.

(Assignment of Error LXXXIV, V. VI, p. 3411.)

Seventh. The court erred in holding that the failure to settle the loss by aribitration was due to the conduct of plaintiff and his appraiser.

(Assignments of Error CXIV, CXV, CXVI, CXVII, CXVIII and CXIX, V. VI, pp. 3418-3419.)

Eighth. The court erred in failing to find the amount of plaintiff's loss as represented by unsalvaged merchandise as distinguished from salvaged merchandise and burned out of sight merchandise.

(Assignments of Error XCVI, XCVII, XCVIII and XCIX, V. VI, p. 3414.)

Ninth. The court erred in finding that the pricing and grading of the merchandise on the Radford inventory was fraudulently padded, and that there was deception as to price or quality,

and fraudulent manipulations of records by plaintiff.

(Assignments of Error CIII, CIV, V. VI, p. 3415; Assignments of Error CV, CVI and CIX, V. VI, pp. 3416-3417.)

Tenth. The court erred in finding that plaintiff ever repudiated the accuracy of his books.

THE FIRST ERROR RELIED UPON.

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR SPECIAL FINDINGS.

Summary: The memorandum opinion of the trial court does not comply with Equity Rule 70½, nor with permitted variations thereof; findings of fact and conclusions of law are not separately stated; the opinion is discursive, argumentative and indefinite; the court failed to find on the principal issue of the case; other findings made were not within the issues.

ARGUMENT.

At the conclusion of the trial plaintiff made a motion for special findings. (V. VI, p. 3380.) The motion was denied and the memorandum opinion of the court adopted as its findings of fact and conclusions of law. (V. I, p. 203.) The denial of the motion was specified as error. (V. VI, p. 3421.)

Equity Rule 70½ is as follows:

"In deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts spe-

> cially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record, and if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rules 75 and 76."

This rule has the force and effect of law. (*Roosevelt v. Missouri State Life Ins. Co.* (C. C. A. 8th), 70 F. (2d) 939, 945; *Northwestern Mutual Life Ins. Co. v. Keith* (C. C. A. 8th) 77 F. (2d) 374.)

This court recognizes the necessity of compliance with Equity Rule 70½, but has permitted some variation therefrom.

> *Parker et al. v. St. Sure,* 53 F. (2d) 706;
> *National Reserve Ins. Co. v. Scudder,* 71 F. (2d) 884, 888.

In each of the foregoing cases this court recognized its inherent power to require compliance with the rule and that it would determine in each case whether there was such compliance. Thus in the latter case this court stated:

> "We do not wish to be understood as holding that a mere discussion of the facts by the court in an opinion will be deemed a sufficient compliance with the rule, and we reserve the right in each case to decide whether the findings and conclusions as set forth in the opinion should be accepted in lieu of separate and distinct findings, or whether the case will be returned to the trial court for appropriate findings."

Particulars in Which the Memorandum Opinion Does Not Conform to Equity Rule 70½, Nor to the Permitted Variation Therefrom.

The memorandum opinion of the trial court adopted as its findings of fact and conclusions of law does not conform to Equity Rule 70½, nor to the permitted variations thereof in the following respects and particulars, to-wit:

(a) Findings of fact and conclusions of law are not separately stated;

(b) The opinion (if considered as findings) is discursive, argumentative, and indefinite;

(c) The court failed to find on the principal issues of the case, to-wit, the amount of appellant's loss and the alleged false swearing in reference thereto;

(d) Many of the findings, or purported findings, are not within the issues.

We discuss briefly in the order stated these several defects in the findings:

(a) A mere casual examination of the lengthy memorandum opinion of the trial court (V. I, pp. 174-203) demonstrates that the court totally failed to make separate findings of fact and conclusions of law, but mingled a discussion of law and fact throughout its opinion. The violation of Equity Rule 70½ is so extreme in this regard, and the result so prejudicial to appellant by the many extraneous and unnecessary statements of the trial court, that in this case the

judgment should be reversed. The opinion is more in the nature of a brief for appellees than a judicial decision.

(b) The memorandum opinion, if considered as findings of fact, is discursive, argumentative, and indefinite.

That the foregoing statement fits the memorandum opinion can best be shown by a few illustrations. From page 175 to page 179, V. I, the memorandum opinion discusses alleged suspicious circumstances and then states "I have gone into this evidence thus in detail because the suspicious circumstances surrounding the fire may be considered in connection with the defense of fraud and false swearing." (V. I, p. 179.) (We believe that elsewhere we can demonstrate that the court erred in this conclusion.) Thus the court demonstrates that its consideration of the suspicious circumstances is merely as an argument on another point.

The court states:

> "The values in the original proof of loss were padded * * *" (V. I, p. 180.)

This is a statement or conclusion which has no definite meaning, and is not a finding upon any issue. It cannot possibly be of any assistance to this court.

In its opinion (V. I, pp. 183 to 185), the court discusses the burning of burlap, the extent of the fire, the testimony of fire chiefs, all purely discursive and argumentative.

Again the court states:

> "Plaintiff, on the witness stand, devoted most of the first day of the trial to establish the accuracy and completeness of his books * * * subsequently in the course of the trial plaintiff repudiated the accuracy of his books." (V. I, p. 186.)

We are unable to find anything in the record to the effect that plaintiff-appellant either affirmed or denied the accuracy of his books. The statement of the trial court above quoted is no finding of any fact; it is only a reflection on appellant, and we believe is without basis.

Again the court states:

> "There was a deliberate deception as to price." (V. I, p. 188.)

This statement, of course, by innuendo refers to plaintiff. It is not a finding on any issue, and is indefinite as a finding of any fact; it is in substance only an argumentative conclusion reflecting on appellant's case.

Again the memorandum opinion states:

> "It is in itself significant that Hood & Strong were employed for the preparation of this report and the reports on which this case went to trial, instead of Ernst & Ernst, who were familiar with the books."
>
> (V. I, p. 190.)

It seems to be self-evident that this statement is nothing but an argument designed to reflect upon the case of plaintiff.

Many other instances might be added, such as the "fraudulent manipulation of records by plaintiff" (V. I, p. 192) (plaintiff never placed a figure in his books or directed the placing of a figure therein); "Colbert (was) induced by plaintiff to betray the interests of his employer." (V. I, p. 198.) If true, this matter had no connection with this case, and is another argumentative reflection on appellant.

Further the court states:

> "I have discussed with some detail which I believe supports my finding that plaintiff was guilty of fraud and false swearing in connection with his proofs of loss and the pleadings and testimony in this case, and that his conduct has barred his right of recovery herein."
>
> (V. I, p. 203.)

The foregoing statement is too indefinite to constitute a finding of fraud or false swearing, and the latter portion could be known only to the trial court. Note the words "that his conduct has barred his right of recovery herein". Can this court assume, or can anyone determine what the trial court meant by the "conduct" of plaintiff which "has barred his right of recovery herein"? This is not a finding on any issue, nor even an attempt to do so, and what was in the mind of the court is forever hidden by the shroud of death.

Although other instances might be mentioned, we believe that the foregoing demonstrate that the memorandum opinion was indefinite, discursive and argumentative in the extreme, and it was such in a way

that reflected unfavorably upon appellant and his case, and was thereby prejudicial.

The opinion was not in accordance with the general law governing findings. This law was stated by Justice Butler in his dissenting opinion in *Los Angeles Gas & Elec. Corp. v. Railroad Commission,* 289 U. S. 287, 327, 53 Sup. Ct. 637, 652, 77 L. ed. 820, 841:

> "The command that the trial court 'shall find the facts specially' means at least, that the statement shall be definite, concise and complete as distinguished from discursive, argumentative, obscure or fragmentary."

(c) The court failed to find upon the principal issue in this case.

The principal issue in this case arose upon the answer of defendants on false swearing. In substance, this answer was that plaintiff in his proof of loss swore that his loss was $73,601.96 when he knew that his loss did not exceed $35,000.00. (V. I, pp. 25-26; V. I, pp. 43-44; V. I, pp. 57-58; V. I, p. 132.)

The court failed to find upon the issue raised by this answer because it never made any finding as to what was the total loss of appellant. Not only did the court fail to find upon this issue, but it did not even correctly state it in the memorandum opinion. Thus in the memorandum opinion (V. I, p. 180) the court states that it is alleged that there was false swearing by plaintiff in making his proof of loss. However, the false swearing was not, and of course could not be, so generally pleaded. The court entirely omitted the second element alleged in the

answer, that plaintiff knew that his loss did not exceed $35,000.00; and it entirely disregarded this element in its long discussion of the facts and law involved in this case.

This issue was the only substantial issue of false swearing in this case, and before it could be held that appellant was guilty of false swearing, it was necessary for the court to find that appellant knew that his loss did not exceed $35,000.00 when he filed his proof of loss. No such finding was made and the court did not find what appellant's loss was or what he believed it to be when his proofs of loss were filed.

The importance and necessity of such finding is apparent from the fact that the court impliedly finds that appellees consented to an auction sale as a method of determining the loss on the salvaged property. (V. I, p. 191.) If this was intended to be the finding of the court, then the loss on the salvaged merchandise was the difference between the inventory thereof of $86,807.98 and the net proceeds of the sale, which were $27,742.32, leaving the loss at $59,065.66. In addition to this the court finds the out of sight loss was $2000.00, and makes no finding in reference to unsalvable merchandise. On the foregoing basis appellant's loss was at least $61,000.00. The defendants did not allege, and it cannot be assumed that they would have alleged, such a small difference between the claim of loss and the actual loss was false or fraudulent. Their whole answer was upon the averment that appellant's loss did not exceed $35,000.00 and he knew it when he verified his proof of loss.

There is no finding, either express or implied, on this averment.

(d) Many of the findings made by the trial court were not within or not responsive to the issues or were upon merely evidentiary matters.

As previously stated, the single substantial issue presented by the answer was that plaintiff swore that his loss was $73,601.96 when he knew that his loss did not exceed $35,000.00. On this issue there was no finding.

None of the defendants alleged that the values in the proof of loss were padded; that plaintiff's claim for out of sight loss was exaggerated; that the proportion of loss claimed on salvaged goods was excessive; that there was deception as to price or a false claim as to any particular item. While evidence of such matters was admissible under the pleadings in an attempt to establish the alleged fact that appellant's loss did not exceed $35,000.00, and that he knew it, findings on such evidentiary facts were not responsive to any issue in the case and cannot sustain the judgment. While we believe that the foregoing is the general rule in reference to findings, it certainly is the rule where fraud is claimed.

No rule of law is better known than that fraud which is relied upon must be specifically alleged, and if it is not alleged it cannot be proved or found. Undoubtedly also, it should be held that except as alleged in their answers that appellant claimed his loss was $73,601.96 when he knew that his loss did not ex-

ceed $35,000.00, appellees waived any other claim or claims of fraud.

The following authorities support the above statements:

"One against whom charges of fraud are made is entitled to specific averments of the acts of which he is accused, so that he may admit or deny them, and thus present the real issues."

12 *Cal. Jur.* 801.

"It is a cardinal rule in equity pleading that the allegata and probata must agree."

Noonan v. Nunan, 76 Cal. 44, 49;

21 *Cal. Juris.* 259.

"A party must recover, if at all, according to his pleadings, and upon the cause of action or defense alleged therein, rather than upon some other and different cause which may be developed by the proof."

21 *Cal. Juris.* 259-260;

Brown v. Sweet, 95 C. A. 117, 125.

"A defense which is not pleaded cannot be considered, although shown by the evidence." (Headnote.)

Wilson v. White, 84 Cal. 239.

"A judgment cannot be sustained unless the proof establishes the cause of action alleged in the complaint, even though a different cause of action be fully proved."

21 *Cal. Juris.* 260.

In a case involving fire insurance the Supreme Court of California held that evidence which was properly admitted upon certain issues of the pleadings could not be considered as establishing fraud and false swearing which was not definitely pleaded.

Greiss v. State Investment and Insurance Co., 98 Cal. 241.

The failure of the trial court to make special findings in accordance with the motion therefor, and in compliance with Equity Rule 70½ requires correction by this court. Lack of such compliance resulted in the case being remanded in the 8th Circuit.

Edwards v. Holland Banking Co. (C. C. A. 8th), 75 F. (2d) 713;

Humphrey v. Helgerson, 78 F. (2d) 484.

In the case of *Panama Mail S. S. Co. v. Vargas,* 281 U. S. 670, which went up from this circuit (33 F. (2d) 894), the Supreme Court remanded the case for lack of findings. Equity Rule 70½ and the similar Admiralty Rule had not been adopted at that time, but they have since been adopted and we believe that case is authority for remanding. This would necessitate a new trial. Perhaps such is the practical procedure, for this court should not be called upon to separate the wheat from the chaff in the long memorandum opinion of the trial court herein.

THE SECOND ERROR RELIED UPON.

THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF WAS GUILTY OF FRAUD AND FALSE SWEARING IN HIS PROOFS OF LOSS AND THAT THERE WAS OVER-VALUATION WHICH RESULTED FROM AN INTENTIONALLY FRAUDULENT ATTEMPT TO GET AN EXCESSIVE AWARD FROM DEFENDANT INSURANCE COMPANIES; FURTHERMORE, ANY DEFENSE OF FALSE SWEARING WAS WAIVED. (Based Upon Assignments of Error XC and LXXXIX, V. VI, p. 3412, said assignments are based upon the memorandum opinion of the Court, V. I, pp. 180, 181, and 203; and upon memorandum denying rehearing, V. I, p. 233.)

Summary: There is no basis for finding fraud in this case; the finding of fraud is too indefinite to support a judgment; the findings of false swearing is also too general and indefinite; the evidence does not support a finding of false swearing by plaintiff in his proofs of loss, for the law of false swearing requires that the alleged false swearer know that he is swearing falsely and such knowledge does not appear in this case; if over-valuation occurred, it resulted from the calculation of able and reputable accountants; furthermore, appellees for many months treated the policies as in full force and effect, and by their conduct waived any defense of fraud or false swearing, and the court should have so found.

ARGUMENT.

Fraud and false swearing are not identical terms, and for convenience and clarity they are considered separately.

There is No Basis for a Finding of Fraud in this Case.

The appellees have never parted with one dollar to appellant herein. They have always resisted appellant's claim, hence it is a necessary conclusion that they have never relied upon and never been injured by any statements or representations of plaintiff, and in the absence of such reliance and such injury, fraud, which may be the basis of an action or defense, is not shown.

> "Fraud without injury is never available as a defense in equity."
>
> *Miller & Lux v. Enterprise Co.,* 142 Cal. 208, 214.

> "It is equally well settled, however, that fraud, unproductive of injury, 'will not justify a rescission, nor support an action either for rescission or damages'."
>
> *Darrow v. Houlihan,* 205 Cal. 771, 774.

> "Fraud without damage is not a defense."
>
> *Hunter v. McKenzie,* 197 Cal. 176, 183.

> "The law seems well settled that fraud without damage gives rise to no cause of action."
>
> *Litchtenberg v. Burdell,* 101 Cal. App. 20, 37.

It follows that fraud, as distinguished from false swearing, should be eliminated as an element in this case.

The Finding of Fraud is too Indefinite.

The finding that plaintiff was guilty of fraud in making his proofs of loss is too indefinite to support the judgment in this case. No principle of law is more firmly established than that fraud cannot be pleaded in general terms, but it must be pleaded specifically; and as it must be pleaded, so must it be found.

Even in its order denying the petition for rehearing, and whereby the trial court attempted to correct its findings, the court did not make its finding sufficiently definite. This portion of its order was as follows:

> "Second, in order to avoid any possible misunderstanding, I find that plaintiff was guilty of wilful and intentional fraud and false swearing in making his proof of loss."
>
> (V. I, p. 233.)

Such statement is entirely too vague and indefinite to comply with the law as to pleading or finding fraud.

> "One against whom charges of fraud are made is entitled to specific averments of the acts of which he is accused, so that he may admit or deny them, and thus present the real issues."
>
> 12 *Cal. Juris.* 801.

> "Whenever fraud constitutes an element of a cause of action or defense which is of an affirmative nature, the facts must be alleged."
>
> 12 *Cal. Juris.* 800.

"Allegations of fraud, being serious in their effect, a finding should ordinarily be expressly made by the court on each issue presented. Fraud is never presumed."

Floyd v. Sierra Grande Dev. Co., 51 Cal. App. 654, 664;

Gillon v. Metcalf, 7 Cal. 137;

Davis v. Robinson, 10 Cal. 411.

"The findings of fact should be definite and certain. They should be so framed that the defeated party can specify intelligently the particulars in which they are not supported by the evidence, where such point is made, and that an investigation is not required upon review to determine what issues have been decided."

24 *Cal. Juris.* 963-964.

"The essentials of findings of fact are that they should be clear, concise, intelligible, definite, certain, unequivocal, direct, positive, and conclusive, and not be vague or evasive."

64 *C. J.* 1247-1248.

Findings of False Swearing too General and Indefinite.

The finding that plaintiff was guilty of false swearing in connection with his proof of loss or in making his proof of loss is subject to the same vice as the finding of fraud. It is too indefinite and uncertain to support any judgment. Doubtless, as in the case of fraud, allegations and findings of false swearing should be specific. However, upon the alleged false swearing that plaintiff claimed a loss of $73,601.96 when he knew his loss did not exceed $35,000.00, the

court made no finding. The court, therefore, did not determine the only substantial issue of false swearing in the case, but makes a finding of uncertain reference. This court cannot know or assume what was in the mind of the trial court from the words used.

The Law of False Swearing.

False swearing is the intentional false statement of a material fact under oath. To constitute false swearing the person under oath must know at the time he swears that the fact he swears to is untrue. Such is the California law, as appears from a number of decided cases, and this case is, of course, governed by the law of California, where it arose. The following cases establish the law of California courts:

In the late case of *Singleton v. Hartford Fire Ins. Co.,* 127 Cal. App. 636, 645, in which a hearing was denied by the California Supreme Court, the following instruction was approved as a correct statement of the law:

> "You are instructed that by false swearing and fraud that will forfeit a policy is meant wilful fraud or false swearing, and not the result of inadvertence or mistake. It should be knowingly and wilfully false, or intended to defraud the company; or if not so intended, must relate to some matter material to the inquiry concerning which the company has a right to know the truth and the effect of which would have a bearing upon its liability. Therefore, if you should find that the plaintiff did make any false statement, that is not sufficient to void the policy unless you further find that his state-

ments were knowingly and wilfully false and intended to injure the company, and if not so intended, must relate to some matter material to the inquiry concerning which the company has a right to know the truth and the effect of which would have a bearing upon its liability."

In the same case the following quotation from the syllabus of *Helbing v. Svea Ins. Co.,* 54 Cal. 156, is approved:

"A provision in the policy of insurance that the application for insurance has been considered as a warranty, and that if the property insured is over-valued in it, the policy shall be void, applies only where the statement as to value is intentionally false. So also, where the policy provides that all fraud or attempted fraud by false swearing as to the loss shall cause a forfeiture of all claims under the policy, a wrongful or intentional false swearing is intended and not a mere discrepancy or innocent error. Also, whether fraud is inferred from an excessive statement of the value of the property in the original application, or of the loss in the preliminary proofs, is a question of fact, and in neither case does a legal presumption of fraud arise; nor is the burden cast upon the insured to establish that his statement was not intentionally false."

And also in the same case, a quotation from the syllabus of *Miller v. Firemen's Fund Ins. Co.,* 6 Cal. App. 395, in the following words, is approved:

"Though wilfully false statements in the proof of loss void the policy when it so provides, yet an untrue statement, to have that effect, must

> have been knowingly and intentionally made by the insured, with knowledge of its falsity, and with the intention of defrauding the company. Whether a false statement was so made is a question of fact for the jury."

Other California authorities to the same effect are:

Raulet v. Northwestern etc. Ins. Co., 157 Cal. 213, 236;

West Coast Lumber Co. v. State, etc. Ins. Co., 98 Cal. 502, 510;

Clark v. Phoenix Ins. Co., 36 Cal. 168, 176.

In the case of *Alliance Ins. Co. v. Enders,* 293 Fed. 485, which arose in Idaho, the late Judge Rudkin, speaking for the court held under the Idaho Statute and following the Supreme Court of Idaho that:

> "The intent is an essential element in the offense of false swearing, and it does not appear from the evidence, that the false statement in the proof of loss was knowingly made by plaintiff."

Measured by the law stated, the evidence does not support a finding of false swearing by appellant in his proofs of loss.

There is No Basis in the Evidence for Holding that Plaintiff Swore Falsely to the Proof of Loss, or that there Was Any Fraudulent Over-valuation.

Appellant was not in personal charge of the factory at the time of the fire and has not been for two or three years. (V. I, p. 467; V. I, pp. 482, 511.) Nat-

urally he did not know what his stock consisted of. (V. I, pp. 482, 483-4.) He depended upon his men in making up his claims. There was nothing else to do. (V. I, p. 515.) The preparation of the proofs of loss was left to Taylor and Sugarman. V. I, pp. 394, 395; V. I, p. 442; V. I, pp. 528, 532.) He had nothing to do with the detail of the business (V. I, p. 540); he made most of the purchases and all the sales and could not handle other details. (V. I, pp. 546-7.) After the first Hood and Strong report of Nov. 1929, the claim was made showing loss of approximately $73,000.00. (V. I, p. 514.) This report is referred to and is shown to be the basis of plaintiff's claim in the proof of loss itself. (Defendants' Exhibit A, V. I, pp. 413, 439. See p. 423 which states "Merchandise value on 10/19/29 as per Hood & Strong, report attached $102,453.23.") This Hood & Strong report is Plaintiff's Exhibit I, pages 246-248. This report reached an estimate of the values on the day of the fire by taking the inventory of December 31, 1928, adding all purchases thereto up to October 19, 1929, and deducting all sales for the same period, less the same percentage of gross profit which was made in the year 1928, and deducting inventory at other locations on October 19, 1929, to arrive at the inventory in the factory on the date of the fire. This whole calculation of Hood & Strong appears in the record. (V. I, p. 248.)

The accuracy of the original claim filed of course depended on two facts, to-wit: The accuracy of the inventory of December 31, 1928, and the fact that the

same percentage of gross profit was received from January 1, 1929 to October 19, 1929. Of course, no one claimed to know this definitely and hence the first report of Hood & Strong, Plaintiff's Exhibit 1, was at best an approximation of the values in plaintiff's factory on October 19, 1929. The report itself shows it was not based on an audit of the accounts. (V. I, p. 246.)

After filing his proof of loss, plaintiff decided to employ the firm of Hood & Strong to make an actual check of his records to determine definitely just what his loss was. This report was based on an actual audit of purchase and sale accounts from May 31, 1929 to October 19, 1929. On May 31, 1929 the firm of Ernst & Ernst, Certified Public Accountants, made an audit of the accounts of Hyland Bag Company and verified the inventory by physical count and certified to its assets and liabilities. (Plaintiff's Exhibit 4, V. I, pp. 255, 265.) Beginning with this inventory of May 31, 1929, as certified to by Ernst & Ernst, the firm of Hood & Strong audited plaintiff's accounts, added all purchases and deducted all sales from May 31, 1929, to October 19, 1929, and arrived at what should be the total stock on hand on October 19, 1929, and from this amount deducted the actual stock on hand at other places, and thus arrived at the stock on hand at 243 Sacramento Street on the date of the fire. The report is Plaintiff's Exhibit 2. (V. I, pp. 249 to 251.) This report states that on the basis of this audit "We have developed the sum of $132,947.44 as being in our opinion a conservative valuation of

the merchandise on hand at No. 243 Sacramento Street at the close of business October 19, 1929." (V. I, p. 250.)

This audit was further supplemented by an effort to determine the actual materials on hand, on October 19, 1929 in the following manner: Ernst & Ernst furnished the detail of the inventory as taken by them on May 31, 1929. (Plaintiff's Exhibit 29, V. I, pp. 285, 287.) Hood & Strong thereupon took this inventory and added thereto the actual purchases of materials and deducted the actual sales, and reported that the actual cost of materials on hand, not including manufacturing costs of bags on hand, nor miscellaneous merchandise, was $124,728.20. (Plaintiff's Exhibit 30, V. I, pp. 288, 293.) Mr. Richards of the firm of Hood & Strong who testified as to all these reports, stated that he accounted for the difference shown by the values in Plaintiff's Exhibit 2 and Plaintiff's Exhibit 30, by the fact that Exhibit 30 was a compilation of raw material only, and did not take into account the cost of manufacturing such bags as were on hand on October 19, 1929, and some other miscellaneous items which were left out. (V. III, pp. 1177-8.)

The figures used in plaintiff's amended complaint were those supplied by Hood & Strong as shown by Plaintiff's Exhibit 2. (V. I, p. 396; V. I, p. 251; V. I, p. 12.) The theory of plaintiff was that the report of Hood & Strong, Plaintiff's Exhibit 2, was a more accurate determination of the value of his stock than Plaintiff's Exhibit 1, on which his proofs of loss were based. (V. I, pp. 12, 13; also V. I, p. 515.)

The plaintiff's factory consisted of four floors, a basement and a mezzanine between the first and second floors. (V. I, p. 237; V. I, p. 240.) As has been stated before, plaintiff had not been in personal charge of his factory for two or three years. Even if appellant had been in personal charge of his factory, it would obviously have been impossible for him to know the details of the stock of so large a business. There is obviously no knowledge of appellant on which to predicate the claim that appellant swore falsely in making his proof of loss.

Apparently, however, it is claimed that plaintiff swore falsely because his stock sheets or perpetual inventory showed stock on hand of the value of $88,-272.55 at the time of the fire, according to the testimony of R. V. Smith, insurance adjuster. (V. V, pp. 2757-8.) Appellant denied such knowledge (V. I, pp. 508-9), and did not remember any such conversation with Mr. Smith. (V. I, pp. 509-11.) There is also the testimony of Mr. Taylor, plaintiff's bookkeeper, who testified "always when I had made a physical count of that material, I would find more material on hand than is shown on the stock sheet." (V. III, p. 1365); and again: "Any day you took an inventory, you would have considerable more burlap on hand than the stock sheets showed, running into very large figures." (V. III, p. 1365.)

Furthermore, Mr. Terkelson, a witness called by appellees, testified that following the fire he kept asking what the values were and no one knew, but he was informed they might run around $130,000.00. His

testimony was: "I kept asking, I asked Mr. Taylor on three or four occasions, I asked Mr. Hyland, and I asked Mr. Sugarman on several occasions also if they had any idea what the valuations were, so that I could assist in the apportionment of the claim. Everyone I asked told me they didn't know. I have a hazy recollection that I was informed on Monday, October 21, 1929, that the valuations might run around $130,000.00, but it did not come from any official source." (V. VI, p. 2970.)

A summary of the inventory taken on September 30, 1929, for insurance purposes, showed merchandise at landed cost in plaintiff's factory of a value of $151,898.72. (V. III, pp. 1397, 1400, Plaintiff's Exhibit No. 98.) The total purchases from October 1 to October 19, 1929, was $39,218.73 (V. III, p. 1401) and the total of the inventory on September 30, 1929, plus the purchases showed a total inventory on October 19, 1929, of the same amount as the Hood & Strong report, Plaintiff's Exhibit 2. (V. III, p. 1402.) The inventory of merchandise on hand on October 19, 1929, at the factory amounted to $132,947.44, not taking into consideration an item of $847.98 representing inks. (V. III, p. 1406.) Another computation by Hood & Strong, showing valuation of burlap, cotton and twine on hand at cost on October 19, 1929, was a total of $106,643.29 for these three items. (V. III, pp. 1425, 1431, Plaintiff's Exhibit 101.) After the fire Mr. Taylor attempted to prepare a memorandum from his stock sheets purporting to represent the merchandise on hand at the factory on the day of the fire.

(V. III, pp. 1416-17.) He could not find the memorandum at the time of the trial, but it was among the papers handed over to Cerf & Cooper. (V. III, pp. 1447, 1448.) The result of this computation was not conveyed to Mr. Hyland or Mr. Sugarman. (V. III, p. 1447.) The papers delivered to Cerf & Cooper were not returned to him. (V. III, p. 1449.) Mr. Taylor's recollection was that his summary of the stock sheets showed a valuation of $88,000.00 or $89,000.00 on the day of the fire. (V. III, p. 1500.) Except from his ledger and incomplete stock sheets he had no record showing the goods on hand at Sacramento Street on October 19, 1929. (V. III, p. 1533.) He could not determine from the stock sheets what was in the plant on the day of the fire. (V. III, p. 1601.) Mr. Smith, adjuster, testified that he stated to Mr. Taylor that he did not have any confidence in perpetual inventories. (V. V, p. 2785.) His experience had demonstrated that they were not reliable. (V. V, pp. 2785-6.) And Mr. Smith himself suggested that "undoubtedly there will be a lot of things which are not kept a record of." (V. V, p. 2632, also V. V, pp. 2798 and 2799.) Plaintiff testified that he noticed what he would judge a lot of ashes after the fire. (V. I, p. 471.) It appears from the testimony of disinterested witnesses that a great deal of debris was removed following the fire. (V. VI, pp. 3050 to 3060; V. II, pp. 767-8.) There was some out of sight loss as the court finds. (V. I, p. 185.)

The evidence showing the general basis of plaintiff's claim may be summarized as follows, to-wit:

First: It appears indisputably from the evidence that plaintiff was not in personal charge of his factory at the time of the fire, and therefore could not know of his own knowledge what was in stock.

Second: Even if plaintiff had been in personal charge of his factory, the stock was so large and the items so many, and the business so large in size, that it would have been beyond the possibilty of any individual knowing in detail what was on hand.

Third: There were no records which showed accurately the quantity of appellant's stock on hand at the time of the fire. Mr. Taylor, appellant's bookkeeper, stated that he kept stock sheets (called by some a perpetual inventory) but these were incomplete and that the physical inventory always far exceeded what appeared on these records. Mr. Smith, adjuster for several of the appellee companies, himself stated that he had no confidence in perpetual inventories.

Fourth: Many loads (a total of sixteen) of debris were removed following the fire, consisting of fragments of burned cotton and burlap, etc. Furthermore, appellant saw what he judged were a lot of ashes following the fire.

Fifth: Not having actual knowledge of the quantity of his stock, and no accurate record thereof, appellant employed certified public accountants to establish from his books the amount of his stock on hand on October 19, 1929, at the time of the fire.

Sixth: Plaintiff's proof of loss, as appears therefrom, was based upon the first report of these ac-

countants. This report was placed in the hands of the representatives of the various appellees prior to filing the proofs of loss.

Seventh: Appellant's claim as made in his amended complaint herein, was based upon a later report and audit by said certified public accountants. This later report was based upon what would appear to be a more accurate method of ascertaining the amount of stock than that used in preparing the first report.

Eighth: This second report of the certified public accountants reconciled in substance with the summary of inventory taken on September 30, 1929, for insurance purposes, which summary was prepared for report for insurance purposes under "reporting" policies.

Ninth: There is not any suggestion anywhere that appellant ever put a figure in his books, or ever directed anyone to put any particular figures therein, or that he even suggested to anyone the placing of an untrue figure thereon, nor that he ever suggested to any accountant employed by him the making of an untrue or exaggerated statement or report as to values or quantity of stock on hand, or that he did otherwise than attempt to ascertain as accurately as possible the quantity of his stock on hand the day of the fire.

Conclusion—No False Swearing in Fact.

From the foregoing basic facts, it seems elementary that appellant cannot be charged with false swearing

as to his claim for the total amount of stock on hand at the time of the fire as shown by able and reputable certified public accountants after an audit of his books. Any suggestion to the contrary simply has no foundation whatsoever in the evidence. If there is any over-valuation in the claimed total of plaintiff's stock at the time of the fire, or in the claimed total of his loss, it is the error of capable and reputable accountants.

Any Defense of False Swearing Was Waived by Defendants.

Even if there was any basis for a claim of false swearing in fact, the evidence in this case indicates that the appellees waived such defense and the trial court should have so found. The court, however, failed to make any finding of this waiver.

The facts of the waiver are shown by the record:

About two weeks after the Radford inventory was finished appellant desired to sell the salvaged merchandise to the best advantage. (V. II, p. 993.) Appellant filed his proof of loss which claimed his loss at $73,601.96. It included out of sight loss in the sum of $15,645.25, and the estimate of damage to salvaged merchandise and the pricing thereof. The defendants disagreed to the claimed loss, and demanded appraisement. The goods were held, the market was declining, expenses accrued, and finally the merchandise was sold at auction slightly more than six months after the fire occurred. The delay and the handling of the merchandise naturally cost several thousand dollars.

In their objection to the proof of loss, appellees did not claim any false swearing. For several months following its filing they did not deny liability or assert any forfeiture by reason of such false swearing. They participated in the sale of the merchandise at auction. Their conduct at all times was that the contract was in full force and effect and that they were liable thereon. These facts, we believe, establish a waiver of any previous ground of forfeiture for claimed false swearing.

The general law in reference to waiver of a forfeiture of an insurance policy is as follows:

> "A waiver arises from acts, words, or conduct on the part of the insurer, done or spoken with knowledge of a breach of condition, which amount to a recognition of the policy as a valid existing, and continuing contract, or which are inconsistent with an intent to claim a forfeiture, or which are such as to reasonably imply a purpose not to insist upon a forfeiture. The rule is well settled that when the insurer, with knowledge of all the facts constituting a breach of a condition or a warranty, requires the insured, by virtue of the policy, to do some act or incur some trouble or expense, the forfeiture is deemed to have been waived."
>
> 26 *C. J.* 283.

Any cause of forfeiture of an insurance policy, including false swearing, may be waived.

> *The West Coast Lumber Co. v. The State Investment & Ins. Co.,* 98 Cal. 502, 511-512;
>
> *Concordia Fire Ins. Co. v. Koretz,* 60 Pac. 191 (Colo).

"The provision of the policy quoted above (fraud and false swearing) is for the exclusive benefit of the insurance company, and may be waived by it."

Solem v. Connecticut Fire Ins. Co., 41 Mont. 351, 355, 109 Pac. 432.

"Anyone may waive the advantage of a law intended solely for his benefit."

25 *Cal. Juris.* p. 929;

California Civil Code, Sec. 3513.

"Since the law favors the waiver of forfeitures, the amount of evidence necessary to establish such a waiver is less than that needed to establish a forfeiture. Waiver may be shown by parol, and by circumstances or a course of acts or conduct, proof of express language being unnecessary."

25 *Cal. Juris.* p. 932.

"It follows from the fact that forfeitures are abhorred that a waiver of forfeiture is favored and requires less evidence to establish than is required to establish a forfeiture. Indeed, it has been held that slight evidence of waiver is sufficient."

12 *Cal. Juris.* p. 642.

It is respectfully submitted, therefore, that not only was there no false swearing in fact, but even if there was, it is apparent that appellees waived any claim for forfeiture of the policies herein by reason of alleged fraud or false swearing in the proofs of loss, and that a finding of such waiver should have been made by the trial court.

The second error relied upon should be sustained.

THE THIRD ERROR RELIED UPON.

THE COURT ERRED IN HOLDING THAT THE HEART OF PLAINTIFF'S CONTENTION IS THAT LARGE QUANTITIES OF GOODS WERE BURNED OUT OF SIGHT, AND THAT UNLESS LARGE QUANTITIES WERE BURNED OUT OF SIGHT, PLAINTIFF'S CLAIMS ARE SO EXCESSIVE AS TO BE FALSE AND FRAUDULENT. (Assignment of Error XCII, V. VI, p. 3413.)

Summary: If the court meant by the word "heart" the largest or most important, it was clearly in error, as the claim of loss on salvaged merchandise was nearly 80% of the amount claimed in the proof of loss; but even if appellant's claim for out of sight loss is not sustained, appellant's claim is not rendered false and fraudulent; there was a reasonable and substantial basis for appellant's claim for out of sight loss, and the trial court found there was some out of sight loss; excessiveness of claim does not establish fraud as a matter of law; moreover, it appeared always in this case that the claim for out of sight loss was a matter of calculation and opinion, and therefore not fraudulent.

ARGUMENT.

The third error relied upon is based upon assignment of error XCII, V. VI, p. 3413, and said assignment of error is in turn based upon the following statement appearing in the memorandum opinion of the trial court:

> "The heart of the plaintiff's contention is that large quantities of goods were burned out of sight. The evidence as to the quantity and grades of merchandise remaining after the fire is complete. The valuation of these materials and determination of the extent of the damage to them are not

difficult problems. The amount of damage as evidenced by these materials is so far below even the lowest claims of loss that, unless large quantities were burned out of sight, plaintiff's claims are so excessive as to be false and fraudulent." (V. I, p. 182.)

The Meaning of "Heart" Used by the Court.

By the use of the phrase "heart of plaintiff's contention" in the foregoing statement, the court must have meant the largest or most important element in appellant's loss. Unless this meaning is attributed to the phrase in this connection, the statement of the trial court is so indefinite and uncertain as to be entirely meaningless, and useless as a finding or statement of any fact. Yet if the trial court used the phrase in connotation of largest or most important, it was demonstrably in error.

Plaintiff's Claim of Out of Sight Loss Never Most Important.

Plaintiff's original claim of loss was for the sum of $73,601.96 (V. I, p. 423); of that amount the sum of $15,645.25, or only slightly more than 21% was for merchandise burned out of sight or into such small fragments as to be unsalvable. Or deducting the sum of $15,645.25 claimed for out of sight loss from the total amount claimed, it is apparent that the amount of the loss otherwise claimed is the sum of $57,956.71. It thus appears as a mathematical fact that the out of sight loss was not the largest or most important part of the loss claimed by appellant, and therefore it was not the "heart" of plaintiff's contention.

It may be said, furthermore, that appellees never regarded appellant's claimed out of sight loss as the most important element of his claim. This is sufficiently apparent from the fact that appellees originally admitted that appellant sustained a loss amounting to the sum of $22,733.18 (V. I, p. 407), and later by their answers admitting that he sustained a loss not exceeding $35,000.00, yet they at no time, either at the trial or prior thereto, conceded ANY out of sight loss.

Therefore, both as a mathematical fact and from the attitude of appellees in this case it must be concluded that the trial court was in error in considering the "heart of plaintiff's contention" is the claimed out of sight loss.

Even if Appellant's Claim for Out of Sight Loss is Not Sustained for the Claimed Amount, Appellant's Claim is Not Thereby Rendered False and Fraudulent.

The question of the out of sight loss of appellant was and certainly is an important problem in this case, but the trial court could not, as a matter of law or fact, rightfully conclude that if appellant's claim for an out of sight loss or for unsalvable merchandise was not sustained, his claim was *ipso facto,* excessive and fraudulent. The court should rather have considered whether or not appellant's claim for out of sight loss had any reasonable and substantial basis, which was consonant with the good faith of appellant in making his claim. To determine whether or not appellant's claim for an out of sight loss comports with

good faith, let us examine the record to determine the basis of appellant's claim for out of sight loss.

The Basis of Appellant's Claim for Out of Sight Loss is Reasonable and Substantial.

As has already been pointed out, one of the first problems which confronted appellant after the fire was to determine what stock he had on hand at the time of the fire. To do this he employed able and reputable public accountants who furnished him the estimate received in evidence as Plaintiff's Exhibit 1. (V. I, p. 246.) There was also made a complete inventory of all salvable stock which appears in evidence as Plaintiff's Exhibit 42. (V. I, pp. 361, 377.) Appellant was in the situation then of having an estimate by expert accountants of what his stock amounted to at the time of the fire, and he had an inventory of what was left after the fire. The difference could only be accounted for by merchandise completely destroyed or burned into such small fragments as to be totally unsalvable, and hence plaintiff claimed this difference as merchandise totally destroyed. The method of calculation, and the calculation itself in arriving at this claim appears as part of appellant's proof of loss, which was received in evidence as Defendant's Exhibit A. (V. I, pp. 413, 439, the particular calculation referred to appears V. I, p. 423.)

Further justification for appellant's claim in this regard rests in the fact that appellant's own bookkeeper testified on the trial that his stock records were incomplete and that the physical quantity of

merchandise on hand always far exceeded what his records showed. The claim is also justified by the fact that appellant himself observed what he judged a lot of ashes, and by the fact that sixteen loads of debris were removed from the premises following the fire, including burned fragments of burlap, cotton goods, etc.

Under these circumstances, it is apparent that it would have been foolish for appellant not to make a claim for stock which should have been there at the time of the fire, but which was not, in fact, there following the fire.

Indeed, the justification for appellant's claim appears in the opinion of the trial court itself. Although it appears from the evidence that adjuster Smith, representing some of the defendants, considered there was no destroyed stock, and in the rejection of the proof of loss, nothing whatever was allowed for totally destroyed merchandise (V. I, p. 407), nevertheless, the trial court states:

> "I believe that some of the stock was burned out of sight, but that the amount was small. If it were necessary to determine the amount of out of sight loss, I should find that it was the difference between the perpetual inventory kept by plaintiff as of the date of the fire and the merchandise removed after the fire and counted by Radford, or approximately the sum of $2,000.00." (V. I, p. 185.)

The trial court, therefore, upholds appellant in claiming an out of sight loss of at least $2,000.00. And

if appellant was justified in claiming any out of sight loss, how was he to arrive at the amount of such loss otherwise than from the reports of his accountants?

The fact that the trial court determined that appellant claimed too much, should not at all lead to any conclusion that appellant's claim was fraudulently excessive when appellant made his claim upon the basis which any normal, reasonable, and honest individual would under similar circumstances.

Basis of Claim for Destroyed Merchandise Under Amended Complaint is Reasonable and Substantial.

The most substantial difference between appellant's claim under his amended complaint and in his original proof of loss was in an increase of his claim for merchandise burned out of sight or totally destroyed. This later claim was arrived at in exactly the same manner as that made in the original proof of loss, except that it was based upon what was deemed a more accurate determination by expert accountants auditing appellant's books to arrive at the stock of merchandise which appellant had on hand at the time of the fire. This report of accountants was introduced in evidence as Plaintiff's Exhibit 2. (V. I, pp. 249, 252.) It was supplemented by a later report, Plaintiff's Exhibit 30 (V. I, pp. 288-9) and reconciled substantially with the inventory summary made for report to insurance companies by appellant's bookkeeper on September 30, 1929, which appears in evidence as Plaintiff's Exhibit No. 98. (V. III, pp. 1397, 1400.)

Again we say, that if expert accountants report that so much merchandise should have been on hand at the time of the fire, and an inventory shows the quantity remaining after the fire, and a quantity of undetermined amount is destroyed as shown by debris, etc., then appellant as any reasonable, normal, and honest man, was justified in claiming as out of sight loss the difference between what remained after the fire and what his accountants said should have been there at the time of the fire. For so doing appellant should not be deemed guilty of an attempt at fraud, or of making an excessive claim.

Therefore, in so far as the trial court deemed appellant's claim for out of sight loss was fraudulently excessive, we submit that the trial court erred, and since the trial court deemed this was the heart of appellant's claim, the error certainly was substantial.

The Trial Court Erred in Holding that Excessiveness Established Fraud as a Matter of Law.

The trial court stated in the portion of its opinion above quoted:

> "Unless large quantities were burned out of sight, plaintiff's claims are so excessive as to be false and fraudulent."

In this statement it is apparent that the Honorable Trial Court labored under an error of law. As has been pointed out, no one knew the amount of goods entirely burned or burned to small fragments and removed as debris. In order, then, for appellant to have

been guilty of false swearing it must appear that appellant knew that the amount he claimed as an out of sight loss was grossly exaggerated. But this knowledge of appellant is a question of fact and not of law, and should be found as a fact and not made a legal conclusion.

The authorities are in general agreement that even though the statement of quantity or value of merchandise burned has been grossly exaggerated, fraud is not thereby established as a matter of law, but it must appear that the insured knew that his claim was false. Following, we believe, is a correct statement of the law which is supported by many authorities:

> "The mere fact that the assured in the proofs of loss, has made an over-valuation of the property destroyed will not defeat a recovery on the policy for the actual loss sustained. If the assured in making proofs of loss, acts in good faith, in the honest belief that the property destroyed was worth the amount of the valuation placed upon it, and the excessive valuation was not intended to deceive or defraud the insurance company, such over-valuation cannot be held to be fraudulent, and it will not defeat a recovery."
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> *Commercial Ins. Co. v. Friedlander,* 41 N. E. 183 (Ill.);
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> *Oshkosh Packing & Prov. Co. v. Mercantile Ins. Co.,* 31 Fed. 200;
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> *Helbing v. Svea Ins. Co.,* 54 Cal. 156;
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> *Singleton v. Hartford Fire Ins. Co.,* 127 C. A. 635, 646.

Out of Sight Loss Claimed in this Case Was Matter of Opinion and Not Fraudulent.

The fact that in this case the amount claimed for out of sight loss was a matter of opinion or estimate from the calculations of the accountants Hood & Strong, appears from the proof of loss itself, which referred to their report. (V. I, p. 423.) The report referred to is Plaintiff's Exhibit 1 (V. I, pp. 246, 248) and it is also clearly shown from the testimony on the cross-examination of the witness, Ben Sugarman, who prepared the proofs of loss for appellant. This testmony was as follows:

> "As to R. V. Smith telling me in his opinion nothing was burned out of sight, I do not think I put it down to any definite amount; I told him there must be an out of sight there. I do not know what was burned out of sight. I endeavored to ascertain by the Hood & Strong statement. Yes, in answer to your question, 'You took the Hood & Strong statement setting the value at $102,000, you took the value set forth in the schedule attached to the proof of loss, and arrived at the opinion that the difference between them represented something that must have been burned out of sight?'" (V. II, pp. 1024-5. See also V. II, p. 1033.)

As a matter of opinion or estimate known to defendants to be such, the claim for an out of sight loss could not have been fraudulent.

On this point, the case of *Simon Cloak & Suit Co. v. Aetna Ins. Co.,* 141 N. Y. S. 553, is well considered.

There the claim was made that the difference between the plaintiff's claim and the verdict of the jury was so great that plaintiff's claim should be deemed fraudulent and the verdict set aside. The court stated in denying the motion to set aside the verdict:

> "It must be remembered, however, that every case of over-valuation, no matter how great or small, is not necessarily an instance of fraudulent misstatement. Therefore, whether the difference between the amount claimed and the amount awarded is of such nature and amount as to justify the court in setting aside the verdict depends on the facts of each case. Davis v. Guardian Ins. Co., 87 Hun. 414, 34 N. Y. S. 5332.
>
> Examining the matter under consideration, the evidence disclosed that the plaintiff asserted a claim much in excess of the amount of the loss as found by the jury. Perhaps it is safe to state that the difference amounted to more than 100 per cent. It is also evident from the testimony that the plaintiff had no means by which it could positively determine the value of the goods destroyed. That it was compelled to estimate its loss is indisputably apparent from the manner in which the loss was calculated. It is quite apparent that its misstatement was based upon an erroneous estimate. In consequence, the exaggeration of the value must be held to be an expression of an opinion, which does not operate to avoid the policy, since under such circumstances there is absent the essential of fraud. 13 Am. & Eng. Ency. of Law (2nd) 342."
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> *Simon Cloak & Suit Co. v. Aetna Ins. Co.,* 141 N. Y. S. 553, 555.

A similar holding has been indicated by the Supreme Court of California in the case of *Helbing v. Svea Ins. Co.,* 54 Cal. 156, 159. In that case the action was to recover loss on a stock of merchandise and the defense of false swearing was made. There was a verdict for plaintiff of $2,000.00, and the defendant appealed claiming, among other things, that plaintiff's claim was fraudulently over-valued. However, the court held the over-valuation could not have been fraudulent, stating:

> "It is true that soon after the fire the assured submitted their claim, wherein they alleged the aggregate of their losses to be over $4,500.00, but the claim was accompanied by an exhibit, from which it appeared that their estimate was based upon the amount of bills for goods purchased during a period of several months prior to the fire, less the amount of cash sales during the same period. It would not have been credible that the defendants could have been deceived by such a statement and exhibit, and it appears affirmatively that its agents were not deceived."
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> *Helbing v. Svea Ins. Co.,* 54 Cal. 156, 159.

In its opinion in the case of *Clark v. Phoenix Ins. Co.,* 36 Cal. 168, 176, the Supreme Court of California said:

> "Upon the question of fraud or false swearing on the part of plaintiff in estimating his losses, in actions of this character, a discrepancy between his estimate and the actual loss, as proved at the trial, which can be reasonably accounted for on the score of opinion, is entitled to no weight."
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> *Clark v. Phoenix Ins. Co.,* 36 Cal. 168, 176.

THE FOURTH ERROR RELIED UPON.

THE COURT ERRED IN FINDING THAT PLAINTIFF KNEW WHAT WAS IN HIS FACTORY AND THAT HIS CLAIM OF LOSS WAS OVER-VALUE, AND THAT HE TRIED TO ESCAPE RESPONSIBILITY FOR ANY OVER-VALUATION ON THE GROUND THAT THE PROOFS WERE PREPARED BY HIS EMPLOYEES, AND IN FINDING THAT THEIR KNOWLEDGE WOULD BE IMPUTED TO HIM. (Based Upon Assignment of Error XCI, V. VI, p. 3412.)

Summary: The proof of loss was prepared for plaintiff by Mr. Sugarman; pricing of articles was made by Mr. Taylor; the pricing was done in accordance with an agreement, or supposed agreement, between Mr. Sugarman, representing plaintiff, and Mr. Smith, representing appellees; if anything was overpriced, it was understood that it would be immaterial and harmless because any increase thereby would be equalized by decrease in out of sight loss: plaintiff did not know what his loss was, and there is no evidence he tried to magnify it; it is erroneous to impute errors of others to appellant as false swearing to establish a forfeiture.

ARGUMENT.

The error here relied upon is based upon the following portion of the memorandum opinion of the trial court:

> "Plaintiff attempts to avoid responsibility for any over-valuation on the ground that proofs of loss and the foundations for the claims sued for in this action were prepared by his bookkeeper and accountants hired by him and that he merely signed what was presented to him. I believe the evidence shows that such was not the fact—that plaintiff knew what was in his factory and that

his claim of loss was over-valued. In any event, under the circumstances of this case, the knowledge of his agents would be imputed to him." (V. I, p. 181.)

A consideration of the evidence pertaining to this matter shows that the proof of loss in this case was prepared by appellant's adjuster, Mr. Ben Sugarman, and the pricing of the items of salvaged merchandise shown on the Radford inventory was made by appellant's bookkeeper, Mr. George P. Taylor. The pricing was made in accordance with an understanding or a supposed understanding, between Mr. Sugarman and Mr. Smith, representing some of the appellees. It was a fact that appellant neither prepared the proofs of loss, nor priced the merchandise thereon, but he relied upon others to do this, though appellant swore to the proofs after they were prepared.

Thus appellant testified:

"I am not familiar with the schedule attached to our proof of loss. That schedule was made up by our accountant, Mr. George P. Taylor, and Mr. Ben Sugarman; I had nothing whatever to do with it. I did appear before a notary public and swear to the correctness of that statement. I knew that the schedules on that proof of loss were prepared for the purpose of presenting to an insurance company. And for the purpose of making a claim under that insurance policy. Acting on the advice of Mr. Ben Sugarman, our adjuster, who handled the entire matter, I caused it to be presented to the insurance company for the purpose of collecting money."

(V. I, p. 442.)

Again appellant testified:

"No, I was not thoroughly familiar with that schedule when I swore to the proof of loss. That schedule had been prepared, as I advised you before, by Mr. Ben Sugarman and by our accountant, Mr. George P. Taylor. I did none of the detail work. I swore to it. I was not thoroughly familiar with the Radford inventory; I had looked it over just casually. I was leaving all of that work to Mr. Taylor and to Mr. Ben Sugarman."

(V. I, p. 446.)

Appellant was not personally in charge of the factory at the time of the fire, and did not know of his own knowledge what materials were there. This appears in the evidence:

"Eliminating the patched grain bags, I do not know what any of the materials was * * * I was not personally operating the factory."

(V. I, pp. 483-4.)

"As I have stated before to you, Mr. Thornton, I had not been in the habit of visiting the factory very often for three years."

(V. I, p. 482. Also V. I, pp. 467 and 511.)

He further testified:

"Mr. Thornton. And in that claim you showed a valuation of $15,000 for merchandise burned out of sight.

Mr. Schmulowitz. I object to that because the document will speak for itself.

A. I do not recall the figures, or any of the details. I had nothing whatever to do with the making up of that claim."

(V. I, p. 514.)

And again:

"The prices set forth in that proof of loss represented our actual cost, to the best of my recollection. That is to the best of my belief. I don't know that to be an actual fact. I had nothing whatever to do with making that up."

(V. I, p. 527.)

And again:

"I cannot state 'whether any of the prices set forth in that schedule represented the actual value on October 19.' As I told you before, the work was handled entirely by Mr. Sugarman and by Mr. Taylor. I had nothing whatever to do with it."

(V. I, p. 528.)

And again:

"A. I did not set forth these values. I can only repeat that Mr. Sugarman and Mr. Taylor handled the entire thing. I personally had nothing whatever to do with it.

Q. Then you could not look at this inventory or at this proof of loss and tell us whether or not the values set forth as to cotton sugar liners, or A. B. S. sacks, or beet pulp sacks, or any of the other sacks included in there are correct?

A. It is my understanding that they were, or I would not have signed it. The work was left entirely in the hands of Mr. Ben Sugarman and Mr. Taylor."

(V. I, p. 529.)

Mr. Ben Sugarman testified:

That he discussed the pricing of the goods on the Radford inventory with Mr. R. V. Smith, adjuster

for several of the appellees (V. II, p. 980) and that it was agreed that a fraction of a cent should be added to take care of cables and other overhead (V. II, p. 980); that it was said "that if the inventory was slightly over-priced it would react against Hyland (appellant) and not against the insurance companies, because the higher that this was taken, the less the obliterated item would be" (V. II, p. 980); that he told Mr. Hyland "I thought the five bale (Bemis) price plus this fraction would be a proper basis for inventorying the goods, and I left the inventory with Mr. Hyland." (V. II, p. 981.)

Mr. Sugarman further testified:

> "Failing in arriving at an agreement with the adjusters concerning the amount of the loss, I undertook the preparation of the proof of loss to be filed on behalf of Mr. Hyland. The work was done in my office. I obtained the data appearing in that proof from the Radford inventory and the Hood & Strong report, plus a list of expenses incurred in the work, the total of which was given to me by Mr. Taylor; and in addition to that I had an inventory of stationery, an inventory of sample bags, and a valuation on the brand, which I had secured from, I think, Mr. Ledgett, and that is what I used to give me the information for making the proof up."
>
> (V. II, p. 985.)

Also:

> "My attention being directed to the merchandise totally destroyed being reported in that proof of loss at $15,645.25, I arrived at that figure as follows: I took the merchandise value shown by

the Hood & Strong statement, $102,453.23, and deducted from that the inventory of the Radford schedule, which showed $15,645.25. That was how I arrived at that figure."

(V. II, p. 986.)

And again:

"The other data appearing in the proofs of loss was likewise prepared in my office. And the blank spaces were filled in at my office. Upon the completion of the proofs of loss, I submitted them to Mr. Hyland. I requested him to sign them in the presence of the notary, and he suggested that we send for a notary and we 'phoned for Miss Herzog of Ray Benjamin's office, to come over and bring her seal, and she came over and Mr. Hyland signed it in my presence. Mr. Hyland glanced at the schedules appearing on each proof of loss, I would not say that he checked them."

(V. II, p. 988.)

And again:

"I had in mind that if this inventory was higher I was giving the insurance companies the benefit. Yes, I was, because that would decrease the out-of-sight damage. The higher the inventory the less the out-of-sight damage. Yes, I made the statement to Mr. Smith. As for his telling me I was crazy, I disagreed with him, and still do as to the out-of-sight damage being reduced. Subsequent to the pricing of that inventory I made up an estimate of the percentage of loss and damage on the items involved."

(V. II, p. 1006.)

He also testified:

"When the Radford inventory was completed as to the list of items, I brought it over to the premises on Sacramento Street. I was accompanied by my brother Harry. During all these events I was invariably accompanied by my brother Harry. We made a practice to go together on these missions, we go on 95 per cent of them together. When we went over to the premises of the Hyland Bag Company, we saw Mr. Hyland there. At that time I told Mr. Hyland that the inventory was through, was finished as to count, and it would now be necessary to have it priced. He showed me the Bemis list previously referred to, and I told him to price it on the large quantity price plus a fraction of a cent. As to having indicated what that fraction of a cent was to be, I have refreshed my memory on that since Friday; it was half a cent. Mr. Hyland told me to go and give this information to Taylor. I went out in back, to the bookkeeper's desk, and gave these instructions to Taylor, handed him the inventory and told him to get it out as soon as he possibly could. Mr. Taylor's office was to the rear of the premises on Sacramento street; Mr. Hyland's office was in the front. My brother Harry accompanied me to Mr. Taylor. I then repeated to Mr. Taylor what I had said to Mr. Hyland."

(V. II, pp. 1036, 1037.)

Mr. Taylor testified:

"Mr. Ben Sugarman one day brought it down to my desk—I think Mr. Harry Sugarman was with him, I know Mr. Ben was there, and he handed me the Radford inventory with a Bemis

price list, and he asked me to enter the prices opposite each item at the large-quantity price of Bemis, plus some kind of a carrying charge or an overhead of one-half a cent. I followed that out all the way through. And in making the notations that do appear on these sheets, it was my intention to cover the unit of material according to the Bemis price list, the large-quantity price. Yes, plus one-half cent to which Mr. Sugarman has made reference, he directed me to do it that way. So far as I know, those entries were correct. I intended that they should be correct, in accordance with that formula."

(V. III, p. 1450.)

He further testified as to the basis of values on bags in the Radford inventory. This appears as Defendant's Exhibit CC. (V. III, pp. 1554-5.)

The statement of the trial court that appellant attempts to avoid responsibility for any over-valuation on the ground that the proofs of loss and foundations for his claims were prepared by his bookkeeper and accountants is not just to appellant. In testifying how the claims were prepared and presented, appellant was merely stating the facts. He was not attempting to escape any responsibilty, but was explaining his lack of knowledge and inability to answer questions propounded to him.

It is manifest, too, from the evidence quoted, that appellant did not know what was in his factory and did not know and it did not believe that his claim of loss was over-valued, if in fact it was over-valued. He relied upon reports made up from his records as

any normal human being would have done. Any belief of the trial court that appellant personally knew what was in his factory, is a belief without foundation in the evidence, and is in fact contrary to the evidence.

Likewise, it is apparent that none of the appellant's agents had exact knowledge of what was in the factory, and hence there was no knowledge in appellant's agents which could be imputed to appellant. To find out what was in his factory expert accountants studied his records and furnished the reports which were placed in evidence. This is the only information which can be imputed to appellant, and appellant admits relying upon these reports. There is absolutely no suggestion in the evidence that any accountant acted dishonestly or attempted to exaggerate appellant's stock or claim.

It appears also that the salvaged merchandise was priced, or intended to have been priced by the Bemis 5 bale price, plus one-half cent per yard. From the evidence quoted above it is apparent that Mr. Ben Sugarman thought that this was in accordance with an understanding with Mr. Smith, and that the higher the inventory value of the salvaged merchandise the less would be the out of sight loss, and hence there could not be any possible damage to appellees. This sounds entirely reasonable and probable, and there is no contrary finding. It is certain that the insurance companies could not be harmed by such procedure, because whatever increase might appear by reason of greater total in amount of damage on the salvaged

merchandise, would be equalized by decrease in claim for out of sight loss. Certainly the adoption of this procedure pursuant to an understanding, or even a belief of an understanding, with the agents of appellees cannot, by any stretch of the imagination, be deemed fraudulent.

A fair consideration of the evidence shows that in preparing his proofs of loss plaintiff acted in good faith and the agents upon whom he relied acted in good faith. Appellant did not attempt, and there was no necessity for him to attempt to avoid responsibility for any over-valuation in his proofs of loss.

We respectfully submit, moreover, that even if there was over-valuation known to appellant's agents, the trial court erred in concluding, as a matter of law, that such knowledge would be imputed to appellant. So far as we have found, this point has not been passed upon in the State of California, or in the Ninth Circuit. Elsewhere there are authorities both ways.

Reason and justice support a conclusion contrary to that reached by the trial court. What we believe to be the correct conclusion is reached and stated as follows:

> "Forfeitures are not regarded with favor."
> 21 *C. J.* 100.

> "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created."
> Sec. 1442 *Civil Code of California.*

The statutory form policies provide that they shall be void—(b) "in case of any fraud or false swearing by the *insured*" (italics ours). Strict construction of this condition, in order to prevent a forfeiture, does not permit of its extention beyond the act of the insured personally, unless he knowingly acquiesced in the act of others.

The language of the dissenting judges in the case of *Mick v. Corporation of Royal Exchange Assurance,* 91 Atl. 102, 52 L. N. S. 1074 (N. J.) is potent and inescapable and should be adopted as the law by this court. We quote a portion of the dissenting opinion therein as follows:

> "If false vouchers were produced without the respondent's fraud, the most he can be charged with is negligence (which is not made a ground for forfeiture in this policy), unless such a forfeiture clause, properly construed, penalizes him for the fraud of another. This brings us to the established canon for the construction of forfeiture clauses in contracts. Such clause in the contract before us is in these words: 'This entire policy shall be void in case of fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss.'
>
> The natural construction of the words 'fraud or false swearing by the insured' under the *maxim noscitur a sociis,* is that, as false swearing must be the act of the insured, so the fraud referred to must also be his act, i. e. a fraud perpetrated by him, or with his consent, or to his knowledge, Carson v. Jersey City Ins. Co., 43 N. J. L. 300, 39 Am. Rep. 584.

> This, if it be not the necessary construction, is at least a permissible construction, which is all that is required by the canon stated, viz: that the language of a forfeiture is to be constructed as favorably to the party whose property is to be forfeited as is consistent with the fair principles of interpretation; and surely no one will contend that the interpretation of associated words according to the *maxim a sociis* is not a fair principle of interpretation. The notion that this established canon of construction does not apply to a contract of insurance because the policy is in standard form has no foundation in law or reason. As was said by this court in Hampton v. Hartford F. Ins. Co., 65 N. J. L. 267, 52 L. R. A. 344, 47 A. 434: 'The court will never seek a construction of a forfeiture clause which will sustain it, if one which will defeat it is reasonably deducible from the terms or words used to express it.' "
>
> *Mick v. Corporation of Royal Exchange Assur.* 91 Atl. 102, 52 L. N. S. 1074 (dissenting opinion.)

The language above quoted presents a just rule of law and there is other authority to the same effect.

Metgzer v. Manchester F. Assurance Co., 102 Mich. 334, 63 N. W. 650;

Boston Marine Ins. Co. v. Scales, 101 Tenn. 628, 49 S. W. 743, 746.

For the foregoing reasons appellant's assignment of error XCI should be sustained on account of error in fact by the trial court and also for error in law which would impose a forfeiture upon appellant for

acts of his agents, which, if they were fraudulent, were fraudulent without his knowledge.

THE FIFTH ERROR RELIED UPON.

THE COURT ERRED IN CONSIDERING THE SUSPICIOUS CIRCUMSTANCES SURROUNDING THE FIRE IN CONNECTION WITH THE ALLEGED FRAUD AND FALSE SWEARING. (Assignments of Error LXXXVI, LXXXVII and LXXXVIII, V. VI, p. 3411.)

Summary: There is no charge or imputation that appellant set the fire or had guilty knowledge thereof, therefore, any suspicious circumstances surrounding the fire cannot possibly be of any weight against appellant; however, the trial court states that it did consider these circumstances against appellant, consequently it committed prejudicial error.

ARGUMENT.

The fifth error relied upon is based upon the following assignments of error:

"LXXXVI.

> The court erred in finding that the suspicious circumstances surrounding said fire of October 19, 1929, in plaintiff's factory, may be considered in connection with the defense of fraud and false swearing as to values where the estimate of value in the claim of loss is grossly excessive." (V. VI, p. 3411.)

"LXXXVII.

> The court erred in its conclusion that the suspicious circumstances surrounding said fire of

October 19, 1929, in plaintiff's factory, may be considered in connection with the defense of fraud and false swearing as to values where the estimate of value in the claim of loss is grossly excessive." (V. VI, p. 3411.)

"LXXXVIII.

The court erred in considering and enumerating the alleged suspicious circumstances surrounding said fire of October 19, 1929, in plaintiff's factory." (V. VI, p. 3411.)

These assignments are based upon a recital of evidence pertaining to the fire as appearing in the memorandum opinion (V. I, pp. 176-179), and particularly the following statement of the trial court:

"I have gone into this evidence thus in detail because the suspicious circumstances surrounding the fire may be considered in connection with the defense of fraud and false swearing as to values where the estimate of value in the claim of loss is grossly excessive. Orenstein v. Star Insurance Co., 10 Fed. (2d) 754 (C. C. A. 4)." (V. I, p. 179.)

If there were any suspicious circumstances surrounding the fire, we submit that the trial court committed grave error in holding that they should be considered as any evidence upon the issue of fraud and false swearing, since there was no issue and no claim whatsoever that plaintiff set the fire or had any guilty knowledge thereof. The honorable trial court states:

"It is not an issue in the case, nor is it claimed by defendants that plaintiff set the fire or had

guilty knowledge of the incendiarism. The evidence was introduced to establish that plaintiff knew that the fire was of incendiary origin when he swore to the proofs of loss." (V. I, p. 179.)

If there is no claim or imputation that plaintiff set or had guilty knowledge of the fire, no matter what suspicious circumstances surrounded the fire, they furnish no basis for any criticism of appellant. In order for such circumstances to be considered against appellant, there should be some imputation or suspicion that appellant set the fire or had guilty knowledge thereof. Whatever suspicious circumstances were created by others cannot affect appellant. This seems elementary.

In considering claimed suspicious circumstances against appellant on the question of false swearing the trial court erred. This error to some extent affected the court, otherwise it would not have said such evidence should be considered, and hence the error was prejudicial and requires correction by this court.

THE SIXTH ERROR RELIED UPON.

THE COURT ERRED IN CONSIDERING THAT THE AMOUNT OF INSURANCE CARRIED ON THE STOCK WAS A SUSPICIOUS CIRCUMSTANCE. (Assignment of Error LXXXIV, V. VI, p. 3411.)

Summary: Appellant did not know the amount of insurance he was carrying, the insurance was entirely in charge of Mr. Taylor without interference of plaintiff, and Mr. Taylor procured the insurance car-

ried; an insurance expert testified that it is not unusual for a stock to be overinsured. Hence there is no foundation for the amount of insurance to be deemed a circumstance prejudicial to appellant.

ARGUMENT.

In its memorandum opinion the court states:

> "What might be deemed a further suspicious circumstance is the total amount of insurance carried upon the stock of merchandise. I find that the value of the stock at the time of the fire was approximately $88,000, yet according to plaintiff's own theory of the insurance involved in this suit, he carried insurance on the stock amounting to $185,000."
>
> (V. I, pp. 178-179.)

Under the circumstances in this case, and the evidence as produced, no more unfair and unjustified statement could be made. We submit that the unquestioned evidence in the case shows that the amount of insurance on plaintiff's stock could not possibly be deemed a suspicious circumstance. Plaintiff did not even know the amount of the insurance he was carrying. He had had very little to do with the insurance for years, having left the matter entirely in the hands of Mr. Taylor, and Mr. Taylor attempted to see that the stock was covered by insurance at all times. And it was testified by the insurance expert that where a stock is fluctuating it is not at all unusual for a firm to be overinsured.

To substantiate the foregoing statement, we quote the following portion of the testimony:

Mr. Hyland testified:

"I had nothing whatever to do with carrying of the insurance. That was handled entirely by Mr. Taylor, as I told you before."

(V. I, p. 531.)

He further stated:

"I know nothing whatever about the placing of insurance. Mr. Taylor handled it entirely. I did not interfere with him in any way. The insurance was handled by Mr. Taylor, as I have told you repeatedly."

(V. I, p. 532.)

Again he stated:

"Mr. Taylor had absolutely full scope to insure as he saw fit. It was entirely in his charge, and I had nothing whatever to do with it. Not for many years prior to the fire had I given him any instructions as to insurance. I had told him at the time to just keep covered. I did not check up the amount of insurance premiums that we were paying from time to time prior to the fire. I left that entirely in the hands of Mr. Taylor, except the Marine insurance. Answering your question, 'do I mean by that to state that I did not know on the day of this fire, or on the night of this fire, the amount of insurance we had there', that is a positive fact. I did not. I did not even know approximately. I trusted Mr. Taylor to keep covered, and I left it entirely in his hands and I have never interfered with him."

(V. I, p. 533.)

Mr. Taylor testified:

"I had charge of the insurance for Hyland Bag Company in 1929. Mr. Hyland requested me to take charge of that department somewhere about either 1919 or 1920. Since then I had continually taken charge of the insurance. My instructions were just to see that we were thoroughly covered all the time. That was about the only instruction that I remember. Never once, to my knowledge, in all of the years that I was there did Mr. Hyland interfere with me in what I did in insurance matters. He did not give me any instructions as to kind or classification of insurance that I should place. I think we brought Mr.Hyland in once on Use & Occupation Insurance and once on Marine Insurance. Outside of that I do not remember ever speaking to Mr. Hyland on the insurance question."

(V. III, p. 1413.)

The record shows that on or about September 30, 1920, plaintiff reported to the Western Insurance Company in a report which was prepared by Mr. Taylor, that the values of the stock and merchandise had reached $179,510.52. (V. I, p. 357.) When Mr. Taylor found that the values had run up to this amount, he testified as follows:

"When that report was completed, I got to Mr. Terkelson as fast as I could. We were not covered, and the thing was to get to it as fast as I could get. As to what extent did I realize that the Hyland Bag Co. was not covered as of that date, it would be $115,000 as against $179,-000, about $64,000."

(V. III, p. 1420.)

The report of September 30, 1929, as to values was received by the general agents of the Western Insurance Company of America, as shown by the testimony of Mr. McLaren. (V. III, p. 1131, and V. III, pp. 1132-1133.) Mr. McLaren testified:

> "As to getting a picture there that if they had $200,000, there, they would carry $200,000 of insurance on $179,000 worth of stock. Lots of times things like that happen. Where your stock drops down, and instead of cancelling at short rates, you let it continue until the stock goes up again. I knew that was the purpose of reporting policies, and I knew that the Hyland Bag Company followed the custom of reporting policies, and they realized the convenience of reporting policies."
>
> (V. III, p. 1152.)

And again he said:

> "It frequently occurs that an insured carries over-insurance."
>
> (V. III, p. 1154.)

From the foregoing testimony, it is obviously the fact that the plaintiff did not know the amount of insurance he carried, at the time of the fire. If he was over-insured, or under-insured, he did not know it, and hence a statement of the court as to the insurance being a suspicious circumstance is without any foundation whatsoever.

SEVENTH ERROR RELIED UPON.

THE COURT ERRED IN HOLDING THAT THE FAILURE TO SETTLE THE LOSS BY ARBITRATION WAS DUE TO THE CONDUCT OF PLAINTIFF AND HIS APPRAISER. (Assignments of Error CXIV, CXV, CXVI, CXVII, CXVIII, and CXIX, V. VI, pp. 3418, 3419.)

Summary: Any finding of fact that the failure of an appraisement was due to appellant or the appraiser appointed by him, is contrary to the evidence; the evidence shows that appellant's appraiser did his utmost to secure the appointment of an umpire, and after the ninety days had expired when appellant could bring suit, appellant's appraiser was anxious to have the appraisement brought about; no objection was made to the competency or disinterestedness of appellant's appraiser, and no valid objection existed to him, or if it did exist, it was waived by failure to object; furthermore, appraisement was waived.

ARGUMENT.

The assignments of error which form the basis of the seventh error relied upon are founded upon that portion of the memorandum opinion of the trial court which discusses the attempted appraisal of the fire loss. (V. I, pp. 196-202.) This discussion refers to the special answer of certain of the appellees which alleged that "the appraisement was not had, due to the acts of the plaintiff and the appraiser appointed by him, and this action was commenced before the compliance by the plaintiff with the provisions of each of said policies of insurance regarding the appraisement of the loss." (Opinion, V. I, p. 197; also V. I, pp. 50, 64.)

The said defense of certain of the appellees was based upon a provision of the policies which provided for appraisement. (V. I, pp. 311-312.) The latter portion of said provision states:

> "If for any reason not attributable to the insured, or to the appraiser appointed by him, an appraisement is not had and completed within ninety days after said preliminary proof of loss is received, by this company, the insured is not to be prejudiced by the failure to make an appraisement, and may prove the amount of his loss in an action brought without such appraisement."
> (V. I, p. 312.)

Plaintiff's action herein was brought because appraisement was not had or completed within ninety days after the preliminary proof of loss was received by appellees.

The honorable trial court states that "Due to the conduct of plaintiff and his appraisers, this was not done, and this suit was instituted." (V. I, p. 202.) Assuming that the honorable trial court intended by this vague language to find that acts of plaintiff and his appraiser prevented appraisement within ninety days, we respectfully submit that such finding is not supported by the evidence. To illustrate this fact, we review the evidence:

The various appellee insurance companies stipulated to receiving preliminary proofs of loss on December 24 and December 26, 1929. (V. I. p. 395.) Appraisal was demanded by the insurance companies which desired appraisement, by letters dated from January 18, 1930, to January 27, 1930, and William

Maris was appointed their appraiser. (V. I, pp. 398-399, 400, 408.) Appellant appointed Mr. George P. Colbert as his appraiser on January 31, 1930. (V. I, pp. 411-412.)

It is a fair inference from the evidence that Mr. Maris and Mr. Colbert discussed the matter on or before February 4, 1930, because on that day Mr. Maris wrote Colbert concerning the schedules. (V. III, p. 1265.)

On February 7, 1930, Colbert wrote Maris referring to a discussion on an umpire and stated:

> "*In order to expedite matters,* I suggest that you propose the names of six gentlemen whom you think would be satisfactory to act with us in this matter." (Italics ours.)
>
> (V. III, p. 1266.)

On February 13, 1930, Mr. Maris wrote Mr. Colbert and in effect stated that he was at that time too busy to give any attention to this matter. (V. III, pp. 1266-1267.)

On February 19, 1930, Mr. Colbert wrote to Mr. Maris and suggested as umpire William A. Sherman, president of the Fire Commission of San Francisco. (V. III, p. 1268.)

On February 25, 1930, Mr. Maris wrote to Mr. Colbert and objected to Mr. Sherman and suggested various persons to act. (V. III, pp. 1268-1271.)

On March 18, 1930, Mr. Colbert wrote to Mr. Maris and apologized for his delay due to press of business of H. M. Newhall & Co., and stated that while the persons named in Mr. Maris' letter were men of in-

tegrity, he objected to them because of their lack of knowledge of the commodity involved, and he in turn suggested the names of a number of persons, none of whom had any intimation that they were being considered. (V. III, pp. 1270-1273.)

On March 28, 1930, Mr. Maris wrote Mr. Colbert indicating that Colbert had called upon him in the meantime, and objecting to the names proposed by Colbert, and himself suggesting additional names. (V. III, p. 1273.)

On April 5, 1930, Mr. Colbert wrote Mr. Maris suggesting additional names and stating:

> "I am very anxious, if possible, to agree on a satisfactory umpire, if such can be done within the next few days."
>
> (V. III, pp. 1274-1275.)

He also calls attention to the sale of the salvage set for Thursday, April 10th, and added:

> "Don't you think, Mr. Maris, that it would be a good thing to have this loss agreed on by competent appraisers rather than by this method of sale?"

and he also adds:

> "I would be very much disappointed if we cannot get together by next Thursday and close this loss by a proper appraisal."

The ninety days from the stipulated receipt of the last preliminary proof of loss expired on March 25, 1930, and on account of the failure of appraisal, appellant's right to sue accrued at that time. Yet said

letter from Colbert to Maris of April 5, 1930, shows that Mr. Colbert is then desirous and anxious for an appraisal to be had. Whatever occurred from this time on, even the absolute refusal of appellant to thereafter have an appraisal, could not have affected his right of action which had accrued.

It surely must be clear from the foregoing facts that up to April 5, 1930, the failure to have an appraisal was not due to any acts of plaintiff or the appraiser appointed by him.

Although anything subsequent to March 25, 1930, would have no bearing on the right of appellant to sue under the terms of the policy, nevertheless we believe the evidence shows that even the failure of the appraisement thereafter was not in anywise attributable to plaintiff or his appraiser.

The substance of the subsequent correspondence is as follows:

April 9, 1930, a letter from Colbert to Maris stating that he will not agree to Mr. P. J. Seale as umpire. (V. III, p. 1276.)

April 12, 1930, a letter from Mr. Maris to Mr. Colbert stating that he accepted Mr. Alexander Logie as umpire. (Mr. Logie had previously been suggested by Mr. Colbert on March 18, 1930.) The acceptance of Mr. Logie states that he had expressed reluctance to act. (V. III, pp. 1276-1277.)

April 15, 1930, a letter from Mr. Maris to Mr. Colbert stating that Mr. Maris had heard from Mr. Logie that he would not act as umpire, stating that

Mr. Wilson would not act, and suggesting that since he had accepted a name proposed by Mr. Colbert, Mr. Colbert should now accept one of his names.

April 17, 1930, a letter from Mr. Colbert to Mr. Maris suggesting any one of the Judges of the Superior Court would likely serve as umpire. (V. III, pp. 1278-1279.)

April 19, 1930, a letter from Mr. Maris to Mr. Colbert stating that he didn't feel that a Judge of the Superior Court would fill the requirements, and stating that he was going to be gone for two weeks.

April 21, 1930, a letter from Mr. Colbert to Mr. Maris stating that it is regrettable that Mr. Maris is leaving the city at this time, "as I was hoping that we might come to some agreement on an umpire as this matter has dragged now for a long period of time." The letter also suggests that Mr. Maris reconsider certain persons proposed by Mr. Colbert. (V. III, pp. 1279-1281.)

May 21, 1930, a letter from Mr. Maris to Mr. Colbert stating that Mr. Colbert's letter had been received in his absence, and suggesting several firms of accountants as possible umpires.

June 7, 1930, letter from Mr. Maris to Mr. Colbert referring to a telephone conversation in which Mr. Colbert told him that he was informed that suit was about to be brought against the insurance companies and further efforts to agree upon an umpire would be futile. The letter criticizes Mr. Colbert in the matter of selection of an umpire. (V. III, pp. 1283-1284.)

June 17, 1930, a letter from Mr. Colbert to Mr. Maris in which he assails the suggestions in the previous letter of Mr. Maris, and states that the criticism is an "insult to the many prominent, outstanding citizens whose names I submitted to you." This letter also attributes to Mr. Maris the fault for failure to bring about an appraisement. It states that he has learned that Mr. Maris is entirely in the employ of the insurance companies, and has been so for many years. (V. III, p. 1284.)

There was a letter offered, but not admitted in evidence, from Mr. Colbert to Mr. Hyland, dated April 15, 1930 (V. VI, pp. 3246-3248), in which Mr. Colbert reviews his efforts to bring about an appraisement, and states that the entire matter leaves him with but "one thought in mind, and that is that the insurance companies and their representatives are not very desirous of arriving at a fair and unbiased appraisal in this matter." And in the letter Mr. Colbert tendered his resignation as an appraiser.

It is impossible for any reasonable person to read the correspondence referred to and reach the conclusion that the failure to make an appraisement within ninety days after the filing of the preliminary proof of loss was due to any act of appellant or his appraiser. On the contrary, it is apparent that Mr. Colbert, the appraiser appointed by appellant, desired to expedite the appraisement, and was anxious to have it brought about before a sale of the salvaged property.

There are only two other items of evidence on this matter.

Mr. Logie testified that he talked to Mr. Colbert; that he would not consent to act unless there was a clear understanding in regard to two matters; that Mr. Colbert said he was required to consult in regard to that, and later phoned and "told me that I had not better serve". (V. IV, pp. 2161-2162.) Mr. Logie wrote Mr. Maris and declined to act as umpire. (V. IV, p. 2186.)

In its memorandum opinion the court states in reference to the refusal of Mr. Logie to serve:

> "He said that Mr. Colbert approached him and when Colbert discovered that he believed that a substantial out of sight loss was impossible, he (Colbert) suggested that he decline to serve". (V. I, p. 202.)

Such situation *does not appear in the evidence.* On the other hand, it was Mr. Colbert who suggested Mr. Logie's name on March 18, 1930, nearly a month before his name was accepted by Mr. Maris. (V. III, p. 1272.) Mr. Colbert or Mr. Hyland did not call upon him until after Mr. Maris had done so. (V. IV, pp. 2173-2174.) Mr. Hyland never spoke to him on the matter. Mr. Logie would not consent to act unless Mr. Colbert was agreeable to two stipulations. (V. IV, p. 2175; V. IV, p. 2161.) Thus the testimony shows affirmatively, not that Mr. Colbert suggested that Mr. Logie not serve, but rather than Mr. Logie would not serve unless stipulations were agreed to. If one of these stipulations was that there should be

no claim for out of sight loss, then there was good reason why Mr. Logie should not act, for in effect this would amount to prejudging appellant's claim.

The only other evidence claimed to bear on this matter is that Mr. Hyland loaned Mr. Colbert money, and in July, 1929, allowed him commissions on two Newhall contracts and a portion of a Newhall credit memorandum. (V. IV, p. 1729.) It is also stated that it appeared that plaintiff paid Mr. Colbert $250.00 in September 1929, and it is claimed that after the fire Colbert signed, at the request of plaintiff, certain contracts which had no validity and were fictitious.

These various latter items of evidence have no bearing whatsoever on the failure of the appraisers to agree upon an umpire. If they had any bearing on this phase of the case, it would be upon the question of the disinterestedness of Mr. Colbert, but his disinterestedness was not an issue under the pleadings. Even if it were an issue, we do not believe that because prior to the occurrence of the fire Mr. Colbert had received commissions or other moneys from appellant, he would be thereby rendered incompetent to act as a disinterested appraiser within the meaning of these policies of insurance.

These policies provide that each party shall pay the appraiser appointed by him; thus in a sense it is contemplated that each appraiser shall immediately become an employee of the party appointing him. It may be said further, that the payments or moneys received by Mr. Colbert appeared on appellant's

books, were open to examination by appellees, and they never made the slightest objection to Mr. Colbert as an appraiser. Unless appellees objected to Colbert, knowing the situation, disqualification would be waived.

As to the alleged fictitious or cancelled contracts—all the evidence and circumstances on behalf of appellant tend to show they were genuine. The evidence of Colbert that they were fictitious was given under intimation of criminal prosecution. But whether they were genuine or fictitious has absolutely no bearing upon the failure to arrive at an appraisement.

We conclude this matter by repeating that the failure to reach an appraisement within ninety days cannot reasonably be attributed to any acts or conduct of appellant or his appraiser—that in reference to this matter the trial court again demonstrated its antagonistic view toward appellant and argumentatively made a conclusion unjustified by the evidence.

Appraisement Rendered Unnecessary and Impossible and Waived by Auction Sale Consented to by Appellees.

An auction sale of the salvaged merchandise was held on April 22, 1930. This disposition of the salvaged merchandise was at the suggestion and with the approval of Mr. Smith, the adjuster for several of the appellees. (V. I, pp. 385-386.) All appellees were notified and it does not appear that any of them objected to the auction sale. (V. I, pp. 387-388.) Mr. Smith was present a part of the time at the sale. (V. I, p. 998.) He was a bidder for merchandise, but did

not succeed in buying it. (V. I, p. 1001.) The trial court states in its memorandum opinion in reference to the salvaged merchandise:

> "The sale of the entire stock at auction and the delay in holding the sale was apparently consented to by the insurance companies."
>
> (V. I, p. 191.)

The auction sale of the salvaged merchandise fixed its salvage value more definitely than any appraisement could possibly have done, and hence rendered the appraisement unnecessary. Furthermore, the dispersion of the merchandise among its various purchasers rendered appraisement impossible. The appellees consented to this auction sale. Hence it must be held beyond any question of doubt that they waived the requirement of an appraisement.

The law on the waiver of an appraisal is well settled.

> "A provision for arbitration or appraisal, of course, may be waived. And either party waives the right to insist upon such provision by any action inconsistent with reliance thereon."
>
> 26 *C. J.* 429.

The sale of the salvaged merchandise and its dispersion among the buyers thereof was clearly inconsistent with reliance upon an appraisal, and since this sale was consented to by the appellees they waived the appraisement.

Accordingly, on the defense based upon failure of an appraisal, not only does the evidence show that the

failure to make the appraisal within the ninety days after filing the proofs of loss, was not the result of any act of appellant or his appraiser, but the facts also show that the appellees waived an appraisal. In either event appellant had the full right to bring his action, and the defense based upon the failure of appraisal is not sustained.

THE EIGHTH ERROR RELIED UPON.

THE COURT ERRED IN FAILING TO FIND THE AMOUNT OF PLAINTIFF'S LOSS AS REPRESENTED BY UNSALVAGED MERCHANDISE AS DISTINGUISHED FROM SALVAGED MERCHANDISE AND BURNED OUT OF SIGHT MERCHANDISE. (Assignments of Error XCVI, XCVII, XCVIII and XCIX, V. VI, p. 3414.)

Summary: The court found the out of sight loss was approximately $2000.00; in addition to this there was the salvaged merchandise as appeared on the Radford inventory, but there was no finding as to merchandise not burned out of sight, yet rendered unsalvable. If the court intended the $2000.00 allowed for out of sight loss to include unsalvable merchandise, such sum is too small, as appears from accountants' reports and the debris removed; such merchandise was certainly a factor to be determined in appellant's loss; and it was not determined.

ARGUMENT.

The eighth error relied upon pertains to the finding that appellant's out of sight loss was approximately $2000.00, and related findings. The assignments of

error are XCVI, XCVII, XCVIII and XCIX, V. VI, p. 3414, and these are based upon the memorandum opinion discussing this matter (V. I, p. 185 to V. I, p. 191):

There was certain merchandise salvaged from the fire and sold at auction; in addition to this the court found that approximately $2000.00 worth of merchandise was burned out of sight. We believe it cannot be determined from the memorandum opinion that the court intended that this figure of $2000.00 should cover merchandise which was not burned up entirely and yet was not salvable and was hauled out as debris.

The accountants reported that much more merchandise should have been in the factory at the time of the fire than appeared on the Radford inventory, and there was evidence that a large quantity, seventy to eighty tons of debris, was hauled away after the fire. The hauling away of this debris was testified to by disinterested witnesses, who did the hauling, and although the appellees claim there was no debris, such claim has no weight against the positive testimony to the contrary.

The allowance of $2000.00 for merchandise burned out of sight could not include unsalvable merchandise represented by this debris, for such sum would be far too small. In either event the court was in error: the $2000.00 figure is too small if intended to include unsalvable merchandise, and if not intended to include such merchandise, then the value of the un-

salvable merchandise should have been determined in fixing the amount of appellant's loss.

The proof of loss in so far as specific items were concerned, claimed a total loss on only three lot numbers of a total value of $344.60. All totally burned up merchandise, and unsalvable merchandise were, therefore, included under the claim as merchandise totally obliterated or destroyed.

The complete basis of appellant's claims in this regard, to-wit, the accountant's report, the ash, and the debris, has been elsewhere discussed in this brief. It appears that there is absolutely no foundation that these claims were fraudulently built up.

THE NINTH ERROR RELIED UPON.

THE COURT ERRED IN FINDING THAT THE PRICING AND GRADING OF THE MERCHANDISE ON THE RADFORD INVENTORY WAS FRAUDULENTLY PADDED, AND THAT THERE WAS DECEPTION AS TO PRICE OR QUALITY, AND FRAUDULENT MANIPULATIONS OF RECORDS BY PLAINTIFF. (Assignments of Error CIII, CIV, CV, CIX, and CX, V. VI, pp. 3415, 3416 and 3417.)

Summary: Radford made an inventory of the salvaged merchandise; said inventory contained some items which did not exist, and it was priced by direction of Sugarman (adjuster for plaintiff) according to Bemis five-bale price, plus one-half cent per yard. The evidence does not show that plaintiff knew that the inventory was erroneous or that the pricing was made other than in good faith; plaintiff had nothing to do with the records. Hence the evidence does not

sustain any finding that the inventory was fraudulently padded, or that there was deception as to price or quality, or that there was any fraudulent manipulation of the records; moreover, these matters were not within the issues.

ARGUMENT.

The ninth error relied upon is based upon a number of seriously prejudicial statements in the memorandum opinion of the court. Thus the court states that:

> "the close approximation of this figure (the Radford inventory) to the book value supports the view that the plaintiff knew that there was little or no goods burned out of sight, and that he deliberately suppressed the records showing values before the fire of nearly the same amount."
>
> (V. I, p. 188.)

And it is stated:

> "The fraudulent padding commenced with the pricing and grading of this inventory."
>
> (V. I, p. 188.)

It is also stated:

> "There was a deliberate deception as to price."
>
> (V. I, p. 188.)

And the court also stated:

> "I shall discuss two of these duplications because they illustrate the fraudulent manipulation of records by plaintiff * * *"
>
> (V. I, p. 192.)

And the court stated:

> "If the quantity of merchandise claimed to have been obliterated had been in the factory at the time of the fire, the building housing the factory would have been taxed with a load beyond its capacity. This was demonstrated by models of the factory and of baled burlap, etc., which were introduced in evidence by defendants."
>
> (V. I, p. 193.)

These statements of the trial court are not a finding upon an issue in this case, and in fact they are mainly argumentative, yet they are so prejudicial to appellant that we believe they should have very careful consideration. Such consideration demonstrates that the trial court was wholly in error in reference to these matters.

There is No Evidence that Plaintiff Suppressed any Record of Values.

Taylor kept appellant's books. (V. III, p. 1297.) He was in full charge and appellant never had anything to do with the bookkeeping. (V. I, p. 266.) After the fire Mr. Taylor attempted to prepare a memorandum from the remaining stock sheets of the merchandise, and during the course of the trial he was requested to find the memorandum, but was unable to do so. (V. III, pp. 1446-1447.) He had shown this memorandum to Cerf & Cooper, who were making an audit of the books and inventory, and pursuant to instructions of Mr. Hyland "to give them everything I possessed" (V. III, pp. 1447-1448), turned it over to them. This memorandum was among

those papers later Cerf & Cooper refused to return to Mr. Taylor. (V. III, pp. 1448-1449.)

Mr. Hart, of Cerf & Cooper, appeared as a witness for appellees. (V. IV, pp. 2287-2288.) He testified that Mr. Taylor furnished him the summary and a copy was put in evidence. (V. IV, pp. 2290-2291.) Mr. Taylor produced the ledger inventory account. (V. IV, p. 2300.) Mr. Hart admitted that instructions had been given not to return some papers to Mr. Taylor. (V. IV, pp. 2321-2322.) When Mr. Hart, on behalf of appellees, visited the office of Hyland Bag Company for the purpose of examining records, he was given everything he asked with the exception of cutting and manufacturing records (V. V, p. 2406), and as to these he was shown the sheets showing the record of bags actually manufactured from December 17, 1928, to October 19, 1929. (V. V, p. 2403.) Original cutting records were not preserved, and the records shown Mr. Hart were the manufacturing records of Hyland Bag Co. (V. VI, p. 3324.)

In view of the fact that appellees were given full access to appellant's books, that they were furnished everything they asked for, in so far as appellant's books are concerned, the statement of the trial court that appellant deliberately suppressed the records is not only entirely without foundation, but it is absolutely contrary to the evidence and demonstrates the erroneous view which controlled the trial court in making its decision in this case.

There Was No Fraudulent Padding as to Quantity or Grade.

Radford took the inventory of the salvaged merchandise. (V. V, pp. 2503-4.) After the merchandise had been piled in the building he was unable to go ahead and make an inventory and state the correct grade of burlap, he was not an expert in burlap. (V. V, p. 2525.) He was given the assistance of a man named Gus Kraus; they went straight through, and Mr. Kraus would state the grade and count the number of bolts and call the total number of yards in each bolt to him, and he would record it. (V. V, p. 2525.) He demanded prices on the inventoried merchandise from Mr. Taylor. (V. V, p. 2528.) He took the word of Mr. Kraus as to the amount and grade of each lot of burlap. (V. V, pp. 2588, 2591.)

It was a fact that certain merchandise appearing on the Radford inventory was not correctly graded. How this happened is not explained. Since the evidence shows, and the court in effect finds, that Radford was more of an employee of appellees than appellant's (V. I, p. 187; V. V, pp. 2548-9), it would seem that the responsibility for incorrect quantity or grading would rest upon Mr. Radford and upon appellees. Mr. Taylor merely priced the list of merchandise furnished him, and did not check as to whether or not it was actually among the stock on hand in accordance with his books. In any event, it does not appear that appellant had any knowledge whether the property listed was actually on hand or supposed to be on hand; nor does it appear that ap-

pellant had anything to do with determining the quantity or grading, or that he knew the quantity or grade was not correct (V. III, p. 1654), and hence it seems preposterous to state there was any fraudulent padding either as to quantity or grading of merchandise; and it is likewise preposterous to say that there was any fraudulent concealment or deception on the part of appellant in reference thereto.

There Was No Fraudulent Padding as to Price.

It is the testimony of all parties that Mr. Taylor priced the inventory. Radford testified that he delivered the inventory to Taylor and requested him to price it. Sugarman testified that he received the inventory, that he had previously discussed pricing with Smith, adjuster for certain appellees, and he discussed it with appellant, and decided that in accordance with his understanding with Smith the proper basis of pricing was the Bemis 5 bale list plus ½¢ per yard for overhead. Taylor stated that in accordance with instructions from Sugarman, he priced the inventory, or at least intended to price it, on this basis.

As to the basis of pricing, Sugarman testified that it was agreed between him and Smith for appellees that replacement cost plus ½¢ per yard should be used (V. II, p. 980; V. II, p. 1037), and that he told Hyland he thought this should be the Bemis 5 bale price plus ½¢ per yard. (V. II, pp. 981, 1037.) Smith stated that the matter had been discussed and that

he was agreeable to some addition, but that ½¢ was unreasonable, and that what he was given was the Bemis one-bale price plus ½¢. (V. V, pp. 2814, 2816.)

Smith further testified:

> "I indicated to Mr. Sugarman that there would be some allowance made for that overhead over and above the Bemis Bros. price-list."
>
> (V. V, pp. 2822, 2823.)

Mr. Sugarman also testified that if the inventory was over-priced in his view the appellees would not be prejudiced thereby, for the higher the inventory of salvaged merchandise, the less the out of sight loss would be. (V. II, pp. 980, 1025.) Prior to the filing of appellant's proof of loss, Mr. Smith had the inventory as priced by Mr. Taylor, and prior to receiving the priced inventory, he had been in consultation with Bemis Bros. and others concerning prices, and he thought Sugarman was not trying to keep faith with him. (V. V, pp. 2828, 2829.)

It is possible, under the evidence in reference to pricing, that the salvaged merchandise was inventoried at too high a valuation, but if so, it is accountable for on the theory that Mr. Sugarman believed it was being priced in accordance with an agreement with Mr. Smith, and he also believed that if anything was over-priced it was not detrimental to appellees. The evidence shows that the whole matter was thoroughly discussed and there was full knowledge on both sides before the proofs of loss were filed. Under all these circumstances, it cannot be said that

there was any fraudulent deception, or any deception or attempt at deception at all in regard to prices, and it cannot be said that the prices were fraudulently padded.

There Was No Manipulation of the Records by Plaintiff.

The court discusses two claimed duplications in the total amount of stock claimed by plaintiff "because they illustrate the fraudulent manipulation of records by plaintiff, and also show the significance of the employment of a different firm of accountants to build up values on the basis of the Ernst & Ernst inventory." (V. I, p. 192.)

So far as employing another firm than Ernst & Ernst, who had prepared an inventory on May 31, 1929, the record shows that Mr. Sugarman suggested the employment of Hood & Strong, certified public accountants. (V. II, p. 984.) Plaintiff in fact stated to Mr. Sugarman that he would prefer Ernst & Ernst (V. I, p. 551), but Sugarman wanted Hood & Strong, and so plaintiff told him to go ahead. (V. I, p. 551.)

How can any court justly say that any unfavorable reflection should be cast upon appellant by the employment of Hood & Strong under such circumstances?

Mr. Hart, an accountant of the firm of Cerf & Cooper, testified for appellees, and stated that in his opinion certain items in the report relied upon by appellant were duplications. Several accountants testified on behalf of appellant and none of them testified that such items were duplications. The weight of the

evidence, we believe, is that the items were not duplicated. However, for the purpose of the argument at this point, let it be assumed that some items were duplicated. Is there any suggestion in the evidence that appellant had knowledge of such duplications? Is there any suggestion in the testimony of any witness that appellant suggested or directed or had knowledge of an untrue entry in his books, or that he directed any entries therein at all, or that he suggested or solicited any untrue report or statement? The answer to all of these queries is NO. Appellant did not manipulate his books at all, fraudulently or otherwise, and he never suggested to or directed any employee to make any fraudulent or deceptive manipulation thereof. It is to be noted that defendants strenuously opposed the appointment of independent accountants to audit and report on appellant's books during the course of the trial. (V. III, pp. 1296, 1423, 1590.)

Amount Claimed by Plaintiff Would Not Over-tax Factory Building.

The statement of the trial court that if the quantity of merchandise claimed to have been obliterated had been in the factory at the time of the fire, the building would have been taxed with a load beyond its capacity is, of course, most prejudicial to appellant. Yet when analyzed is of no value to this court and is, we believe, without support in the evidence.

Its lack of value for this court rests upon the fact of its indefiniteness and its lack of relevancy to any issue in this case.

The trial court does not indicate to what extent the capacity of the building would be over-taxed, nor what the capacity of the building was. Furthermore, it does not appear whether the building would have been over-taxed beyond its capacity by weight or volume. It likewise is not certain in the court's statement, that it was not referring to the approximations of merchandise which were requested and given in connection with use and occupancy insurance and not connected with this case. (V. I, pp. 488-489; V. II, pp. 555-564.) These statements were mere probabilities and were not intended to represent personal knowledge. (V. II, pp. 562, 564.) As has elsewhere been pointed out, Mr. Taylor prepared a report showing values in the factory on September 30, 1929, amounting to $179,-510.52. (V. I, p. 351.) No one has ever questioned the accuracy or good faith of this report.

The appellant's claim in this case was that the merchandise in his factory on the day of the fire was of a value of $132,947.44. (V. I, p. 12, Complaint; V. I, pp. 250-251.)

Since the building would house merchandise on the 30th day of September of a value of $179,510.50, it is difficult to understand that it would not hold merchandise of the same kind of a value of $132,947.44 on the day of the fire.

It is respectfully submitted, therefore, that not only is the statement of the trial court so indefinite as to be valueless, but it is contrary to the fact.

As to the ninth error relied upon, we conclude that the many prejudicial statements of the trial court

which are herein considered were wholly and utterly without foundation in the evidence. Such statements without substantial basis fully demonstrate the error which controlled the trial court in its decision herein, and require a reversal of the judgment.

THE TENTH ERROR RELIED UPON.

"THE COURT ERRED IN FINDING THAT PLAINTIFF EVER OR AT ALL, REPUDIATED THE ACCURACY OF PLAINTIFF'S BOOKS." (Assignment of Error C, V. VI, p. 3415.)

Summary: The evidence shows that appellant neither affirmed nor repudiated the accuracy of his books; the evidence shows he did not do his own bookkeeping.

ARGUMENT.

The tenth error relied upon is based upon the following paragraph in the memorandum opinion of the trial court:

> "Plaintiff, on the witness stand, devoted most of the first day of the trial to establish the accuracy and completeness of his books. Numerous forms were introduced in evidence which had been devised by him as the careful executive in direct supervision of his business, to follow the materials from receipt through the process of manufacture and sale so that at any time the contents of the factory could be calculated. Subsequently, in the course of the trial plaintiff repudiated the accuracy of these books."
>
> (V. I, p. 186.)

The record shows that appellant made no statement as to the accuracy of his books, nor did he ever repudiate their accuracy. Appellant repeatedly testified that the keeping of the books was entirely in the hands of his bookkeeper, Mr. Taylor. He considered Mr. Taylor competent. He made no claims or representations in reference to his books, but at all times invited their examination by accountants for appellees.

For the convenience of the court, we refer to portions of the record as follows:

Mr. Hyland testified almost at the beginning of the trial:

> "Answering your question as to whether I am and have been personally familiar with the bookkeeping system and with the records maintained by the Hyland Bag Company, I have never at any time had anything whatsoever to do with the bookkeeping. We had an accountant, Mr. George P. Taylor, in whom I had absolute faith and he was given full charge, and I permitted him to run his department. As to being familiar with general conditions, yes. I am and have been familiar with the general system of maintaining records that prevailed in our office—in the Hyland Bag Company—during the year 1929."
>
> (V. I, p. 266.)

> "Your question as to whether we also had a ledger account setting up the goods on hand at both Sacramento and Sansome Streets can be better answered by the accountant. I was not doing my own bookkeeping. That set of books had originally been installed by Klink, Bean & Co. of which Mr. Cooper, now of the firm of Cerf &

Cooper, was the manager. I relied on that set of books being sufficient to take care of our requirements. I was not operating the books personally. That was in full charge of Mr. Taylor. I cannot give you all these details, for I have not got them."

(V. I, pp. 499-500.)

"I personally cannot answer your questions as to whether we at any time produced any of our books for any examination by any representative of any of the insurance companies in this action, for I have not had charge of the books, and I paid no attention to them whatsoever. It is true that I am the sole owner of that business, but I am not the bookkeeper any more than you are the stenographer in your office."

(V. I, p. 500.)

"As to our having an expert accountant, we considered Mr. Taylor to be a very able accountant."

(V. I, p. 514.)

This matter is of little importance in the case, except to show the complete error of the viewpoint under which the trial court was laboring when deciding this case.

IF APPELLANT IS ENTITLED TO RECOVER, WHAT IS THE AMOUNT HE SHOULD RECOVER, AND HOW SHOULD IT BE APPORTIONED?

It is equitably unthinkable that the judgment herein should not be reversed. Assuming such reversal, what disposition should be made of the case?

There is sufficient evidence before this court for a final disposition of the case.

In the first place we respectfully urge that a preponderance of the evidence sustains a finding that appellant had values in his factory of the amount alleged in his complaint herein, and that he should be given judgment in accordance with the prayer of his complaint for $106,992.83, with interest from December 24, 1929, the date of filing proofs of loss (V. I, p. 17); and that said loss be apportioned among the appellees in accordance with the respective amounts of their various policies as set forth in the complaint. A table of the amount of insurance and its apportionment appears at volume I, page 16 of the record. Other tables appear at volume III, pages 1261-3 of the record, and make up Plaintiff's Exhibit 92.

An alternative of the foregoing plan is that the difference between the original Radford inventory and the net proceeds of the salvage sale, which was impliedly found by the trial court be adjudged as appellant's loss on the salvaged merchandise; and to this should be added the out of sight loss found by the trial court to make up appellant's total loss.

The original Bradford inventory was	$86,807.98
The net proceeds of the auction sale was	27,742.32
Loss on salvaged merchandise	$59,065.66
Out of sight loss found by court	2,000.00
Total loss of appellant under this plan	$61,065.66

Such loss of $61,065.66 should then be apportioned ratably among the appellees.

A third plan would be for the court to accept the implied finding of the trial court as to the loss on the salvaged merchandise, to-wit, the sum of $59,065.66, and add thereto the amount first claimed by plaintiff as his out of sight loss, to-wit: $15,645.25, to make appellant's total loss. Thus calculated the amount of the loss would be $74,710.91, and it should be equitably apportioned.

If the court does not wish to adopt either of these or some similar plan to make a final disposition of the case, then a new trial should be granted. In the event the court deems proper to grant a new trial, a limitation of the issues would tend to a speedier disposition of the case.

The trial court made no finding that would relieve National Liberty Insurance Company or Western Insurance Company from a proportion of the liability in the event any of appellees are liable. In the absence of such finding, the whole loss should be ratably proportioned among all the appellees.

CONCLUSION.

There are many other assignments of error in this case besides those considered in the foregoing brief. The failure to discuss them herein is not intended as a waiver thereof by appellant, or that they are deemed of no importance. The fact is that the honorable trial court committed so many errors prejudicial to appellant that all of them cannot be considered without making an already long brief unduly long. The errors which

have been discussed show fully that in reaching its decision the trial court labored under errors of both law and fact and did not reach a just conclusion.

To paraphrase a statement of Dr. Johnson, a charge of fraud and false swearing is the last refuge of the insurance company. Whenever, for any reason, an insurance company does not wish to pay a loss, if it cannot find some technicality such as the failure to file a proof of loss, or the failure to reach an appraisement, it has the fraud and false swearing refuge which is always a dangerous instrument against the insured because errors inevitably occur in every proof of loss of any importance, and because it is an attack on the integrity of the insured.

In this case the companies involved sought their last refuge and before the trial court they had wonderful success. They succeeded in depriving appellant of the large sum to which he was entitled to compensate him for the loss sustained, and they also succeeded in taking from appellant his good name.

It is to be noted that at the time of the fire appellant had a net worth of $325,000.00 to $375,000.00; that his sales averaged over $2,000,000.00 per year, and that he had unusual bank credits indicating that he was a man of good reputation and standing in the community (V. I, p. 547); he was a director and large stockholder in a local banking institution. (V. I, p. 235.) The decision herein reflecting upon the character of appellant has swept away the work of years and inflicted immeasurable injury upon him as a business man.

Appellant asks this court to restore both his good name and his purse to him.

There was and is no fraud in this case. The necessary elements of fraud as an action or defense are lacking.

There was and is no false swearing. The trial court decided against the insurance companies on the first alleged ground of false swearing as to the origin of the fire. Its decision is undoubtedly correct on this point as shown by a number of authorities, and we cite only *Schmultz v. Employees Fire Ins. Co.* (C. C. A. 2d), 76 F. (2d) 119.)

The trial court made no finding on the second alleged defense of false swearing that appellant swore that his loss was $73,601.96, whereas he knew it did not exceed $35,000.00. However the court argues, discusses, and either directly or impliedly finds a number of matters not alleged. The law of false swearing, in California at least, requires that the sworn false statement must not only be false, but it must be knowingly and wilfully false, and no presumption of fraud arises from over-valuation, nor is the burden cast upon the insured to establish that a false statement is not intentionally false. (Supra this brief, p. 23.)

The basis of appellant's claim as set forth in his proof of loss was simply an estimate made by reputable certified public accountants of the amount of stock on hand at the time of the fire. That it was an estimate appeared in the proof of loss itself, and this fact was known to all parties before the proof of loss was filed. Appellant did not have and could not have had per-

sonal knowledge of the amount of his stock, and according to his bookkeeper the records did not disclose accurately the amount. Therefore, the appellant was required to use some estimate, and its use could not constitute false swearing.

The basis of appellant's claim in the complaint herein was another estimate of accountants, arrived at by a more accurate method than that used in the first estimate. This more accurate method was to take the inventory at a particular period and add thereto all purchases and deduct all sales to the date of the fire. This should be absolutely accurate, except for possible errors in the original inventory, and possible errors in omission of purchases or sales or duplications. In this regard appellees did not challenge the method, but they claimed duplications. Even if duplications existed, appellant cannot be charged with them, as false swearing but they are only errors of reputable and able accountants.

Likewise, it is apparent that appellant cannot be held responsible as a matter of false swearing if any errors in the pricing, grading, or counting of the salvaged merchandise occurred. In all except pricing, *appellees themselves participated,* and the pricing was done in accordance with an agreement, or supposed agreement between the adjuster for appellees and the adjuster for appellant; and any over pricing was deemed to be immaterial because it would result in reduction of out of sight loss.

There was no false swearing found within the issues, and if it was intended to be found upon matters not

alleged, it has been demonstrated that such findings are not supported by the evidence. Needless to say, forfeitures based on this defense are not favored. We quote the following:

> "But forfeitures are not favored; and to warrant a court of equity in decreeing forfeiture on such ground, the intentional false swearing must be established by evidence 'clear, unequivocal and convincing'."
>
> *Fidelity Phoenix Fire Ins. Co. v. Benedict Coal Corp.,* 64 F. (2d) 347, 352 (C. C. A. 4th).

The failure to reach an appraisement within ninety days after the filing of the proof of loss was not due to any acts of appellant or the appraiser appointed by him. It does not appear that appellant had anything to do with the matter during this period, and the evidence shows that his appraiser was most anxious to reach an appraisement for a considerable length of time after the ninety day period had passed. There was no objection to appellant's appraiser and an auction sale of the salvaged merchandise was consented to by appellees, and hence appraisement rendered unnecessary or impossible and certainly waived.

Therefore, any defense alleged pertaining to the failure of appraisement was not sustained.

Furthermore, the trial court failed to even substantially comply with the requirements of Equity Rule 70½.

The situation, at present, is this: No defense herein can be or should be sustained; no forfeiture is justified or should be permitted; the appellant should recover a

judgment for his loss. The loss probably lies somewhere in between the amount admitted by appellees and the amount claimed by appellant,—that is somewhere between $35,000.00 and $106,000.00. This amount should be ascertained and apportioned among the various appellees; and appellant prays that the judgment herein be reversed and that such judgment and orders be made as will compensate appellant for his loss and vindicate his honor in this community.

Dated, San Francisco,
March 23, 1936.

Respectfully submitted,
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